No. 14834

In the United States Court of Appeals for the Ninth Circuit

COMMODITY CREDIT CORPORATION, APPELLANT

v.

ROSENBERG BROS. & CO., INC., A CORPORATION, APPELLEE

and

ROSENBERG BROS. & CO., INC., A CORPORATION, APPELLANT

v.

COMMODITY CREDIT CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

The Secretary of Agriculture issued a press release on September 5, 1947, announcing a dried fruit purchase program designed to support and stabilize dried fruit prices. Among other things, this program contemplated the purchase by Commodity Credit Corporation (hereinafter referred to as CCC) of 61,000 tons of raisins. Subsequently, CCC issued invitations to bid

on this quantity. Plaintiff's predecessor (hereinafter referred to as The Company) offered to sell a large quantity of raisins, and the offers were accepted by CCC up to the amount of 14,000 tons, and contracts for that amount were thereupon executed. The Company had sold short, and before it had purchased raisins to cover its CCC sales, CCC revised the program by increasing the total raisin purchase from 61,000 tons to 121,000 tons. Subsequently, The Company purchased raisins at prices which plaintiff alleges were higher than they would have been had there been no change in program. The Company filed a complaint (R. 3), alleging breach of both an express and an implied agreement by CCC to restrict its raisin purchase to 61,000 tons. The Government answered, denying any breach, and the case was at issue. The case was tried, and the District Court ruled that the act of the Government in revising the program was a breach of CCC's implied agreement not to hinder or increase the cost of The Company's performance. On May 31, 1955, the Court entered judgment for plaintiff in the amount of $160,-366.88. The defendant filed notice of appeal from the judgment on the 30th day of June, 1955, and the plaintiff filed notice of cross-appeal from the judgment on the 25th day of July, 1955. The plaintiff's action in the District Court was based upon 15 U. S. C. 714b(c). This Court's jurisdiction rests on 28 U. S. C. 1291.

STATEMENT OF THE CASE

On August 1947, the Department of Agriculture adopted a docket styled *Dried Fruit Price Support Program, OC-95A* which was amended from time to time, (Plaintiff's Exhibit 5).[1] This docket as first

[1] The exhibits introduced are listed in Appendix A.

adopted provided for a total purchase of 133,000 tons of dried fruit including 36,000 tons of raisins plus a contingent purchase of an additional 25,000 tons of raisins. The maximum amount of 133,000 tons was inserted in the docket for the purpose of placing a limit upon the contractual authority of the Government's contracting officials (R. 458-459). On September 5, 1947, the Secretary of Agriculture with reference to said docket, issued a press release in Albuquerque, New Mexico, which stated that the Commodity Credit Corporation would purchase up to 133,000 tons of dried fruit including 61,000 tons of raisins, and that the purchases would be made from processors and packers (Plaintiff's Exhibit 4). On September 10, 1947, the Department of Agriculture, by Announcement No. 1, invited offers for the sale of 30,000 tons of raisins and various quantities of other dried fruits (Plaintiff's Exhibit 9). Rosenberg Bros. & Co., the predecessor in interest of the present plaintiff, and referred to herein as The Company, submitted an offer on September 19, 1947, to sell 10,000 tons of raisins to CCC at prices ranging between $151.00 to $152.00 per ton, the amount depending upon the containers used. This offer was accepted on or about September 23, 1947, and on the following day a standard Government contract was executed between The Company and CCC, by the terms of which The Company agreed to deliver 10,000 tons of raisins to CCC in the period October 1–December 15, 1947, upon demand and at the stated prices (Plaintiff's Exhibits 10, 11, and 12).

On October 1, 1947, the Department of Agriculture issued Announcement No. 2 which invited bids for dried fruit including 31,000 tons of raisins. On October 8, 1947, The Company in response to this Announcement

offered to sell 10,000 tons of raisins (Plaintiff's Exhibits 14, 15). On October 9, 1947, the docket was amended (Amendment No. 1), and provision made for increasing the maximum quantity of raisins to be purchased to 121,000 tons, *if such action was required to successfully carry on the price support program* (Plaintiff's Exhibit 5). The record is not clear as to when the Secretary of Agriculture approved the docket but it appears to have been several days later (R. 120-122).

On October 13, 1947, the CCC accepted plaintiff's offer of October 8 to the extent of 4,330 tons priced at $149.40 per ton, and on that date a contract was executed for said amount at said price (Plaintiff's Exhibit 15, 16). On October 14, the Department of Agriculture publicly announced Amendment No. 1 to Docket OC-95a stating that offers would be made to purchase an additional 60,000 tons of raisins (Plaintiff's Exhibit 19). The Company promptly requested cancellation of its contracts following this public announcement, but this request was denied (Plaintiff's Exhibits 17, 23, 26). On October 17, 1947, CCC by Amendment No. 2 to said docket authorized purchase of raisins from growers or processors (Plaintiff's Exhibit 5). On November 26, 1947, the program was further modified by requiring all packers *thereafter* selling Thompson seedless raisins to CCC to certify that they had paid the grower not less than $135.00 per ton (Defendant's Exhibit R; Plaintiff's Exhibit 24).

The Company at the time of executing said contracts had not purchased and did not have available raisins to fill the Government contracts. It was selling short in the hope that raisins would drop in price sufficiently to enable The Company to fulfill the Government con-

tracts without loss (R. 196, 344-345, 586; Defendant's Exhibits K). However, the growers were in continuous resistance to the lower prices offered by the packers and only 800 tons were purchased by The Company in the period September 1–November 3, 1947 (R. 54, 57, 203-206; Plaintiff's Exhibit 46).[2] After that date natural raisins were sold in substantial quantities at prices ranging from $127.00 to $142.00, the peak price being reached in the week ending November 10, 1947 (Defendant's Exhibits K, S, Plf. Exh. 46).[3] Since The Company's normal processing and packing cost was $40.00 per ton, it was impossible for The Company to purchase raisins at these prices without suffering a substantial loss on its Government contracts. Although CCC continuously demanded raisins under the contracts, The Company consistently refused to deliver, stating that it had no raisins available (Defendant's Exhibits V, W, X; Plaintiff's Exhibit 42, R. 301-302, 317-319). In January 1948, the price dropped sharply and raisins were being sold in that month at prices ranging from $100.00 to $125.00 (App. C). By that time CCC was out of the market, The Company's commercial sales were 80% complete, and The Company became acutely conscious of the fact that it had more than enough raisins on hand to fill its remaining commercial commitments. Fearing that it would be left with a large unsold inventory, The Company decided to make delivery to the Government (Defendant's Exhibits D, AC; Plaintiff's Exhibit 44, p. 7; R. 338). In January, the price of raisins had dropped to a point which would enable The Company to purchase raisins

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[2] The Company's purchases on closed contracts are tabulated in Appendix B.

[3] The market prices for the 1947 crop are set forth in Appendix C.

and fulfill its Government contracts, and the Government thereupon requested The Company to make delivery (Plaintiff's Exhibit 29, App. C).

On January 22, 1948, The Company requested shipping instructions and an amendment to the contract reinstating the tonnage and extending the delivery dates. The contracting officer agreed to furnish an amendment reinstating the tonnage and extending the delivery dates, and agreed further that no damages for non-delivery would be claimed by CCC provided The Company agreed to waive all carrying charges. The contracting officer stated that CCC was willing to take delivery at the contract prices, and further stated that the prices would not be raised except with respect to a minor adjustment which related to the type of containers involved. The Company inquired as to whether it could make delivery without prejudice to a claim for additional compensation and was advised that any counter-offer or qualification would require a review by the officials in Washington, and that pending such review, shipping instructions would necessarily have to be issued to other packers. The contracting officer also stated that if The Company would agree to make immediate delivery, shipping instructions would be issued at once, but that CCC could not agree to anything that could be interpreted as recognizing a claim by The Company. On January 28 The Company agreed to make delivery, and delivery was made in the period February-March 1948 (Plaintiff's Exhibits 30, 32, 33, 35, 36, 42, 43; R. 269-270, 604-614).

Vouchers were submitted by The Company at the contract prices and The Company was paid on that basis (Defendant's Exhibit Y; R. 635-636). Plaintiff filed a claim which was denied and this suit was instituted. Plaintiff's complaint sets forth two causes of

action (R. 3). It alleges in substance that the press release was a contractual commitment, and that defendant was under obligation to restrict its purchases to the amounts therein specified. In its second cause of action, plaintiff alleged that the Government's act in revising the purchase program was in violation of its implied obligation to refrain from hindering or increasing The Company's cost of performance. The Government, in its answer (R. 19), denied the existence of such an express or implied contract, and by way of an affirmative defense alleged that the actions complained of were sovereign in their nature and that no liability resulted, and further, that The Company by reinstating the contracts upon the understanding that no claim would be asserted waived the alleged breach.

The District Court ruled in favor of plaintiff, holding that the revised program was in violation of an implied agreement not to increase The Company's cost of performance. The Court further ruled that the acts in question were proprietary and not sovereign, and that there was no evidence establishing the existence of a waiver by The Company of the alleged breach.

Since raisins are a fungible product it was impossible to determine the price paid by The Company for such raisins furnished to CCC. The minimum average price which The Company could have paid for the raisins was $116.16 per ton (Defendant's Exhibit AO). The District Court, however, fixed the price paid by The Company at $120.52 per ton. This figure covered raisins priced up to the final date of delivery (Defendant's Exhibit AO). The District Court also found that The Company would have purchased raisins at $110 per ton had the Government adhered to the purchase program first announced, and awarded damages in the total amount of $160,366.88 (R. 65).

SPECIFICATION OF ERRORS

The points on which the Government intends to rely are set forth in their entirety in Record 677-682. Although the Government has no intention of waiving any of these points on appeal, the following major specification of errors will make clear to the court the issues which are involved:

1. The District Court erred in holding that defendant breached an implied obligation not to hinder, or increase the cost of, performance of Rosenberg Bros. & Co.'s (hereinatfer referred to as R. B. & Co.) Government contracts.

2. The District Court erred in finding that the parties did not and could not contemplate the possibility that CCC might modify the program announced in the press release of September 5, 1947, and that R. B. & Co. did not assume the risk of modification.

3. The District Court erred in finding that had the CCC program remained as announced on September 5. 1947, R. B. & Co. could have purchased naturally conditioned raisins at $110 per ton or less.

4. The District Court erred in holding that the raisin purchase program of CCC was a corporate, commercial and private act, not involving the exercise of Governmental and/or sovereign powers.

5. The District Court erred in holding that R. B. & Co. did not waive its right to claim damages resulting from the alleged breach of contract by CCC.

6. The District Court erred in finding that R. B. & Co. could not have acquired raisins for delivery to CCC at an average of less than $120.50 per ton, and in finding that by reason of the changes in docket, R. B. & Co. was damaged in the sum of $160,366.88.

Other specifications of error directly relate or are subsidiary to the issues raised by these major specifications.

SUMMARY OF ARGUMENT

As to Sovereignty

The decision to buy more raisins was in the exercise of the statutory duty imposed upon the Secretary of Agriculture by Congress to stabilize farm prices. The fact that the policy of stabilization was achieved by purchase contracts does not establish the proprietary character of the program. Since the change of policy complained of was public and general, and sovereign in character, appellant is not liable for any damages caused thereby.

As to the Implied Contract

The District Court ruled that CCC had publicly *promised* prior to execution of the contracts in question to limit its purchase to 61,000 tons (R. 57). The breach of this promise, the Court found, was a breach of CCC's implied duty to refrain from any action which would interfere with, or increase the cost of, The Company's performance. If there is no such promise, then the Court's decision having been based upon an erroneous assumption must fall.

The announcement of the price support program carried with it no contractual commitments. A policy or program dedicated to bringing a fair return to the grower must necessarily be flexible, particularly when the initial proposal rests upon a series of speculative assumptions. Here the program was designed to remove surplus and to stabilize prices at a reasonable level. The program as initially conceived did not give

the desired price support and frequent changes were made thereafter. By the end of the crop year, purchases of all dried fruits had been increased from 133,000 tons to 285,000 tons. The possibility of changing such a program was evident to everyone including The Company. It sold short and below the market price to CCC, gambling on an expected decrease in price. CCC's program was geared to increase the price and that CCC took appropriate steps to accomplish its objective does not render the Government liable on implied contract.

As to Waiver

The Company had not purchased raisins when the alleged breach occurred. Since The Comapny did not contemplate any profit in performing the contract, a rescission would not have caused any damage. Therefore, the performance of the contract, not the defendant's breach, caused the damage and appellant is not liable.

The Company was guilty of breach of contract in not delivering raisins in the period specified. Following the sharp drop in the price of raisins, The Company requested CCC to reinstate the contract and to extend the time for delivery. CCC did so, and The Company performed the contract and delivery was made at contract price. Since The Company knew that the reinstatement of the contract was upon the understanding that CCC would only be liable for the contract price, The Company waived the alleged breach.

As to Damages

Plaintiff could not prove the amount paid for raisins furnished the Government hence, it must be assumed

that plaintiff paid the lowest possible price which was $116.16 per ton. Plaintiff could not prove what price The Company would have paid had there been no change in program, hence, plaintiff has completely failed to prove any damage.

ARGUMENT

I

The Acts Constituting the Alleged Breach Were Sovereign Acts for Which the Appellant Is Not Liable in Damages.

The change in policy and program which the District Court found to be a violation of the contractual commitment of CCC was initiated by the Secretary of Agriculture and carried out by CCC, a Delaware corporation, the stock of which was wholly owned by the United States. The present suit is against CCC, a federal corporation, which succeeded to the assets and the liabilities of the Delaware corporation.[4] CCC, the Delaware corporation, was under the jurisdiction of the Secretary of Agriculture, and was an agency of the United States. *Insurance Company of North America* v. *United States* (C. A. 4), 159 F. 2d 699; *United States* v. *Fleming* (D. C. N. D. Iowa), 69 F. Supp. 252; *Spivey* v. *United States* (C. A. 5), 109 F. 2d 181, 184, (cert. denied 310 U. S. 631).

It is recognized that Government agencies frequently engage in commercial activities, and that the Government is liable for damages caused by such commercial activities, to the extent that Congress has waived sovereign immunity. In this case, Congress has authorized the CCC to sue and be sued, and therefore, no

[4] Details concerning the formation and powers of the two corporations are set forth in Appendix D.

question exists concerning the jurisdiction of the Court to award damages in the event appellee has stated and proved a cause of action.

The problem, as we see it, is to determine (1) whether the acts complained of were sovereign acts; (2) if so, whether the Government contracted to pay for damages caused by such sovereign acts; and (3) if not, whether the acts complained of constituted a breach of contract. This portion of the brief is addressed to the first question. Appellee contends, and the District Court has found, that the changes in program were in the performance of a proprietary function. Appellant challenges this conclusion. To evaluate the conclusion, it is essential to examine the purposes and programs of CCC.

Under the Government Corporation Control Act, CCC is required annually to submit to Congress a budget setting forth, among other things, its plan of operations by major types of activities, together with financial estimates in connection therewith. This budget is considered by the Congress and administrative funds are appropriated for carrying out the budgeted programs. For the fiscal year July 1947-July 1948, the operations of the Corporation, as set forth in the budget,[5] and for which administrative funds [6] were authorized consisted of the following major types of programs: A price support program, a foreign purchase program, a subsidy program, a supply program, and a commodity export program. The price support program was divided into three categories: (1) Price support for basic commodities, (2) price support for Steagall Commodities, and (3) price support for other commodities. It

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[5] See p. 1193 of the Budget Estimates for United States Department of Agriculture for the fiscal year ending June 30, 1948.

[6] Act of June 30, 1947, 61 Stat. 523, 550.

is under this latter category of activities that the purchase contracts with The Company were entered into. In its report in connection with the appropriation making administrative funds available to carry out the Corporation's programs[7] the Appropriation Committee discussed these categories and stated:

> "Its [Commodity Credit Corporation] primary purpose is to support agricultural prices in order to preserve farm purchasing power and incentives for production.
>
> "Farm Prices are supported in a number of ways:
>
> "1. By making loans to farmers on their commodities.
>
> "2. By purchasing commodities which are in surplus and diverting them into channels where the pressure on the normal commercial market will not be so great.
>
> "3. By purchasing commodities for foreign distribution."

Funds for this operation are obtained from the Treasury Department under the borrowing power of the Corporation.[8]

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[7] H. Rept. 450, 80th Congress, 1st Sess., accompanying H.R. 3601.

[8] The price support operations of the Secretary of Agriculture are also financed, in part, through customs duties, 30% of which are transferred to the Secretary of Agriculture for price support operations, which operations are described in Section 32 of the Act of August 24, 1935, as amended, (7 U.S.C. 612(c)) as follows:

> § 612c. * * * (1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation or by payments to producers in connection with the production of that part of any agricultural commodity required for domestic consumption; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal

Many of the Corporation's activities are required to be carried out by specific Congressional enactments. For example, price support loans were made mandatory as to certain designated basic commodities.[9] Also, price support through loans, purchases, or other operations as to the so-called "Steagall commodities" was required.[10] The price support of "other" commodities was optional, dependent upon the need and the funds available. Congress stated:[11]

> (b) It is declared to be the policy of the Congress that the lending and purchase operations of the

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channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; and (3) reestablish farmers' purchasing power by making payments in connection with the normal production of any agriculture commodity for domestic consumption. Determinations by the Secretary as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption shall be final.

Docket OC-95a (Plaintiff's Exhibit 5, p. 5) proposing the Department's initial price support operations for the raisin industry in 1947, specified that part of the 1947 crop raisins to be purchased were to be disposed of by "Sales to Section 32," in other words, were to be financed through such funds and disposed of by the Secretary of Agriculture pursuant to that section.

Shields and Shulman, "Federal Price Support for Agricultural Commodities, 34 Iowa Law Rev. 188, 205-206 (1949)," in their discussion of the "Means of Carrying out Price Support Operations" list and discuss the Commodity Credit Corporation and Section 32 as the two principal means available to the Secretary of Agriculture for carrying out price support operations. (The "means" are not to be confused with the methods of providing price support such as "loans, purchases, payments, other operations, or any combination of these methods." id., 200.)

[9] Section 8 of the Stabilization Act of 1942, as amended (50 U.S.C. App. 968), and the Act of July 28, 1945 (7 U.S.C. 1312, note).

[10] Section 4(a) of the Act of July 1, 1941, as amended (15 U.S.C. 713a-8(a)).

[11] See 15 U.S.C. 713a-8(b).

> Department of Agriculture (other than those referred to in subsection (a)) shall be carried out so as to bring the price and income of the producers of non-basic commodities not covered by any such public announcement to a fair parity relationship with other commodities, to the extent that funds for such operations are available after taking into account the operations with respect to the basic commodities and the commodities listed in any such public announcement and the ability of producers to bring supplies into line with demand.

In summary, it seems evident that CCC price support programs had a public purpose—to preserve purchasing power—to afford incentives for production—to help stabilize the general economy. Now, let us examine the raisin industry, and the CCC's activities in relation thereto, to determine whether CCC was engaged in a price support program or in a private, commercial and non-public operation.

The problem of surplus production in the raisin industry existed prior to World War II. Both the State and Federal Governments had attempted to help the industry solve the problem. See *Parker* v. *Brown,* 317 U.S. 341 (1943) ; and *Brown* v. *Parker,* 39 F. Supp. 895 (S.D. Calif. 1941). Prior to World War II there had been an active and important export trade in raisins, averaging upwards of 60,000 tons per year, but the war had left most Europeon countries so impoverished as to be in a poor position to buy raisins (R. 476-477). During World War II, the problem was one not of surplus but of stimulation of grape production and the channeling of the grapes into raisin production for use as food for war purposes, to the exclusion of other peacetime

uses such as crushing for wine production. The industry was controlled at all levels of production, pricing, and distribution (R. 474; *Gray* v. *Commodity Credit Corporation,* 63 F. Supp. 386 (S.D. Calif. 1945), affirmed, 159 F. 2d 243 (C.A. 9, 1947)).

When price and allocation controls ended in the summer of 1946, buyers for the wineries on the one hand and the raisin packers on the other rushed into the market competitively, long before the crop was "made", bidding prices to the growers for the relatively small crop up to a peak of $330 per ton and an average price of $312 per ton (R. 475).

In the summer of 1947, the Department of Agriculture, as an incident of its continuing study of agriculture and under the added stimulus of inquiries and requests from growers and others, began to consider what action, if any, it should take to assist the industry to dispose of an anticipated surplus of raisins. It was expected by the Department that the packers would approach the 1947 marketing season on a reserved and cautious basis since the price for packaged raisins had declined from 22 cents per pound (November 1946) to 11 cents per pound (July 1947) (R. 476). Both the Secretary of Agriculture and the Board of the Commodity Credit Corporation also approached the problem with care, desiring to keep activity by the Federal Government to a minimum in the belief that the industry should be primarily responsible for the solution of its problems (R. 356-357; Plaintiff's Exhibit 4).

The Department had concluded tentatively in the summer of 1947 that a substantial surplus of 1947 crop raisins was to be expected on the basis of current production and marketing expectations. Such an estimate at that time in the crop year involved considerable un-

certainty, however, in that it required a guess as to what the total grape crop and the various effective demands would be. The tentative estimate was that the surplus might be as high as 100,000 tons or even more (R. 482) out of a total estimated crop of 325,000 tons (R. 157). Experience had been that such advance prediction might vary widely from what actual production and surplus turned out to be (R. 482-483).

Nevertheless, recognizing the probable disaster if the market were left without Government support, CCC prepared a docket in August 1947 identified as *"Dried Fruit Price Support Program OC-95a"* (Plaintiff's Exhibit 5).[12] It provided for the purchase of a maximum of 133,000 tons of dried fruit, and its purpose was stated as follows:

> This docket has been prepared and approval is requested in order that the Department may be in a position to assist the industry during the period of readjustment from the expanded levels of production required during the war and to offset the reduction in export markets resulting from the war, by affording the necessary price support to such fruits during the period of adjustment.

The tentative nature of the initial program was made clear:

> The purchase of approximately 78,000 tons of

[12] As heretofore indicated (p. 13; see also R. 362-363, 479), there are various methods of price support. A price support program may be an undertaking by the Department of Agriculture to underwrite the price of a particular commodity at a specified level by purchases or loans, or it may take the form of a surplus removal operation, which seeks to achieve a desired price level by removal of portions of the available supply from the usual commercial channels, leaving market forces to determine the price of the balance of the supply (R. 480-481; and see 15 U.S.C. 713a-8(b)).

dried apples, dried peaches, dried prunes and raisins, is expected to have stabilizing effect on the market prices for these fruits if commercial exports exceed 100,000 tons. An additional contingency purchase of 55,000 tons of dried prunes and raisins, by Commodity Credit Corporation (making a total purchase of 133,000 tons), is proposed to provide against the eventuality that such exports will be restricted to the point of causing burdensome carry-over stocks and thus defeating the purpose of the program.

Under present conditions it is extremely difficult to evaluate the price effects attributable to changes in the current surplus situation. It is estimated that, in the absence of any Government price support program for raisins, raisins made from the 1947 grape crop may average somewhere below $100.00 per ton.

Disposition of the purchased fruit was provided for:

Dried fruits acquired in accordance with this program will be received by or for the account of CCC and disposed of by sale, pursuant to existing legislation, and by such other legal means as may be prescribed by the Administrator or his designee, as follows:

(a) Sales to Section 32, and to United States Government agencies other than for export.

(b) Sales for export, to foreign Governments and their purchasing agents; to United States Government agencies for foreign relief feeding; to public international organizations like the United Nations; to private domestic exporters; and to foreign importers.

(c) Sales in domestic commercial channels for human food consumption. Such sales shall be made only in the event the Administrator or his designee determines that such sale can be made without depressive effect upon the domestic commercial market for the dried fruits involved in such sale.

(d) Sales in domestic commercial channels for disposal other than as human food. Such sales shall be made only in the event that the dried fruits so to be sold have become damaged to such extent that they are unfit for human consumption.

The program was not calculated to produce income for the Government as the docket indicated:

> The abnormal financial conditions in foreign dried fruit markets, which is the basis for the proposed contingency purchase, and, in part, the basis for the other phases of this program, prevents evaluation at this time of the final financial balance of the program. On the basis of present conditions, the net loss, if any, appears unlikely to exceed $12,000,000.

The Acting Solicitor stated that the docket was legally authorized by virtue of certain general statutes,[13] which were designed to stabilize farm prices and to remove surplus commodities (Plaintiff's Exhibit 5, letter of August 26, 1947).

With respect to raisins the program contemplated a

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[13] The statutes cited by the Solicitor authorizing the price support program were as follows: 15 U.S.C. 713a-8(b) (See p. 14, infra). 15 U.S.C. 713 (Supp. V) authorized continuance of CCC until June 30, 1948; 50 U.S.C. 1630(c) authorized the sale of surplus farm commodities in foreign markets and in the United States under certain prescribed conditions.

maximum purchase of 61,000 tons, but did not fix a price. The docket stated:

> Even in the absence of announced Government purchase prices, the removal of the most price-depressing segment of the supply of dried prunes and raisins will enable the industries concerned to establish prices commensurate with the supply remaining and with the market demand corresponding to it. Under such condition, the accumulated marketing experience of the entire groups of producers and packers is used to establish the price levels necessary to move available supplies into prompt consumption instead of using the vastly more limited knowledge available to the Government to establish arbitrary price levels intended to have the same effect.

As the lower court stated, "The Department of Agriculture hoped that the general purchase program would enable dried fruit growers and processors to establish prices at a fair level," (R. 52; also see Plaintiff's Exhibit 4). The "fair" or "reasonable" (Plaintiff's Exhibit 4) level at which the Department was aiming was $125-$135 per ton for the natural raisins (R. 448, 578-579). The growers on the other hand were aspiring to the parity level provided for some other farm products, which would have meant a grower price of $150-$160 per ton (R. 204, 354, 527, 541, 573).

Following the public announcements of the contemplated dried fruit purchases, The Company submitted offers and executed contracts (Plaintiff's Exhibits 10-12, 15, 16) whereby it became obligated to furnish 14,000 tons of packaged raisins to CCC at a fixed price. These contracts contained in their captions the heading

"Dried Fruit Price Support Program." To break even on its contracts The Company alleges that it would have had to buy natural raisins from the growers at $110 per ton.

The market price of natural raisins at the time of the announcement of the program was not stable. Such 1947 raisins as were then being sold commanded approximately $125 per ton (R. 502, Defendant's Exhibits K, N, p. 15). However, there were practically no sales, and for the few transactions recorded, prices declined gradually until reaching $110-$115 per ton in early October (Defendant's Exhibit K). The growers were in violent revolt against the prices being offered by the packers, and it soon became evident that the prices offered were not either reasonable or stable. Consequently, CCC modified its program from time to time as circumstances warranted. On October 14, 1947, the Department of Agriculture publicly announced Amendment 1 to Docket OC-95a stating that offers would be made to purchase an additional 60,000 tons of Thompson seedless raisins. On October 17, 1947, CCC by Amendment 2 to Docket OC-95a permitted the purchase by CCC of raisins in their natural condition from growers or processors. On November 26, 1947, the Department of Agriculture modified the program further by requiring all packers thereafter selling Thompson seedless raisins to CCC to certify that they had paid the growers not less than $135 per ton (Plaintiff's Exhibits 5, 25; Defendant's Exhibit R).[14] It is this program and these

[14] Docket OC-95a was further amended from time to time as conditions warranted:

a. On November 26, 1947, by Amendment 4 the maximum quantity of dried prunes was increased to 86,000 tons, and the total quantity of dried fruit was increased from 193,000 to 213,000 tons.

modifications which appellee argued and the Court found to be a "purely proprietary function." (R. 59).[15]

The District Court's conclusion is not supported by the evidence or any legal authority known to this appellant, and, we believe, is manifestly in error. Disputes concerning the nature of certain Governmental acts—whether sovereign or proprietary—have been productive of much litigation. For example, it has been held that cities engaged in operating utilities,[16] airports,[17] street railways,[18] public parks [19] and in furnishing harbor pilots [20] are acting in their proprietary

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b. On December 23, 1947, by amendment 5 the purchase of 5,000 tons of golden blanched raisins was authorized.

c. On April 21, 1948, by Amendment 6 the maximum quantity of dried fruit to be purchased was increased from 213,000 tons to 283,500 tons, and the Production and Marketing Administration was given discretion to determine the type and quantity of dried fruit to be purchased.

[15] The District Court stated: "The basis of liability is real and compelling. The CCC adopted an unconscionable and wholly indefensible position, while it engaged in a purely proprietary function. *Amoskeag Mfg.* v. *United States,* 84 U.S. 592. It is not enough to say that CCC as an agency of the United States government was entitled to sovereign immunity. The doctrine of sovereign immunity is not applicable to the facts at large and cannot afford a defense." In the case of *Amoskeag Mfg. Co.* v. *United States, supra,* plaintiff contracted to sell carbines to the Government, delivery to be made within six months. The Government made changes in the specifications which made performance in the contract time impossible. The court held that by making the changes in the specifications there was an implication that an extension of time would be granted. This case does not appear to have much bearing on the distinction between sovereign and proprietary acts.

[16] *Austin* v. *Mayor * * * of Union Beach,* 160 Atl. 318 (N.J.).

[17] *Ex Parte Houston,* 224 Pac. 2d 281 (Okla.).

[18] *Kornahrens* v. *City of San Francisco,* 196 Pac. 2d 140 (Cal.).

[19] *Williams* v. *City of Longmont,* 129 Pac. 2d 110 (Colo.). But see *Honaman* v. *City of Philadelphia,* 185 Atl. 750 (Penna.).

[20] *General Petroleum Corp.* v. *Los Angeles,* 70 Pac. 2d 998 (Cal.).

capacity, whereas the operation of swimming pools [21] and art galleries,[22] schools [23] and slum clearance [24] and the lighting of streets [25] are Governmental functions. If the activity is for profit and is ordinarily engaged in by private individuals, it is generally classified as proprietary in nature. However, if it is not for pecuniary gain, but is undertaken for the common good, it is classified as Governmental in nature.[26]

It may have been this principle that the District Court had in mind in finding that the acts complained of were "purely proprietary." However, this rule relates only to municipal corporations and has no application to the activities of the Federal Government. The Federal Government is sovereign and all of its acts are Governmental in nature, even though performed by federal agencies and instrumentalities. See *Cherry Cotton Mills* v. *United States,* 327 U.S. 536.

In *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102 (1941), the Supreme Court in holding that the lending function of a federal agency was sovereign, not proprietary, in nature stated:

> The argument that the lending functions of the Federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily

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[21] *Shoemaker* v. *City of Parsons,* 118 Pac. 2d 508, 511 (Kan.). But see *Griffin* v. *Salt Lake City,* 176 Pac. 2d 156 (Utah).

[22] *Burnett* v. *City of San Diego,* 273 Pac. 2d 345 (Cal.).

[23] *Daskiewicz* v. *Board of Education of Detroit,* 3 N.W. 2d 71 (Mich.).

[24] *State* v. *City Council of Helena,* 90 Pac. 2d 514. (Mont.).

[25] *Millard* v. *Milford,* 276 N.W. 826 (Pa.).

[26] *Daskiewicz* v. *Board of Education of Detroit, supra.*

follows that any constitutional exercise of its delegated powers is governmental. *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. *Pittman* v. *Home Owners Loan Corp.,* 208 U.S. 21, 32; *Graves* v. *New York ex rel. O'Keefe, supra,* 477.

The federal land banks are constitutionally created, *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions, the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank* v. *Priddy,* 295 U.S. 229, 231; *Federal Land Bank* v. *Gaines,* 290 U.S. 274, 254.

The Supreme Court in *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 383-384 (1947), emphatically repudiated the contention that the Department of Agriculture's crop insurance operations through the analogous Federal Crop Insurance Corporation were subject to the same principles of liability as if the corporation were a private insurance company, saying:

> It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over

> a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.

It is also equally well established that the Government is not liable for damages resulting from the performance of its sovereign functions. In *Deming's Case,* 1 C. Cls. 190, 191, a change in the legal tender act was held to be a sovereign act. The court said:

> A contract between the government and a private party cannot be *specially* affected by the enactment of a *general* law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the Government entering into a contract, stands not in the attitude of the government exercising its sovereign power of providing laws for the welfare of the state. The United States as a contractor are not responsible for the United States as a lawgiver.

In *Jones & Brown's Case,* 1 C. Cls. 383, 384-385, the withdrawal of troops was held to be a sovereign act. The court stated:

> In the recent case of *Deming against the United States* this court decided that a contract between the Government and an individual cannot be affected specially by a general law. That principle

> we now reiterate and extend to the case before us. The "obstructions" and "hindrances" complained of on the part of the United States were the withdrawal of their troops from the military posts in the Indian country, contrary to the terms of the Indian treaties; and it is insisted, "as a matter of law," that "the United States could not change their *attitude* or their *policy* in a material degree, "without incurring the responsibility of making the claimants just compensation for all additional expenses thereby incurred." (Emphasis supplied)

In *Grant* v. *TVA,* 49 F. Supp. 564 (D.C. Tenn.), plaintiff's crops were damaged by flood waters, and the court held that TVA was not liable for damages resulting from its sovereign function of promoting navigation and controlling floods. In *Commonwealth Finance Corp.* v. *Landis,* 261 F. 440 (D.C. Pa.), the Emergency Fleet Corporation was held not liable in damages when engaged in matters of a military nature where it was acting for the general welfare and protection of the people.[27]

The fact that the Government in a sovereign capacity interferes with the performance of a contract made by the Government does not alter the rule of non-liability. In the leading case of *Horowitz* v. *United States,* 267 U.S. 458 (1925), Horowitz made a contract to buy

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[27] Other activities held to be of a sovereign nature were the regulation of military traffic, *Hallman* v. *United States,* 68 F. Supp. 204 (C.Cls.), the acts of the Wage Adjustment Board, *Kirchhoff* v. *United States,* 102 F. Supp. 770 (C.Cls.), the priority system, *Clemmer Construction Co.* v. *United States,* 71 F. Supp. 917 (C.Cls.), and Government price control, *Piggly Wiggly Corp.* v. *United States,* 81 F. Supp. 819 (C.Cls.). Cf. *New York* v. *United States,* 326 U.S. 572.

silk from the Army, the Army agreeing to ship in a specified period. Horowitz resold the silk and gave shipping instructions to the Army. The silk, however, was not shipped by the Army, because the Government, acting through the United States Railroad Administration, had placed an embargo on silk shipments. The price of silk fell and Horowitz lost his resale. The Supreme Court upheld the Court of Claims finding that Horowitz could not recover, saying:

> It has been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming* v. *United States,* 1 Ct. Cls. 190, 191; *Jones* v. *United States,* 1 Ct. Cls. 383, 384; *Wilson* v. *United States,* 11 Ct. Cls. 513, 520. In the *Jones Case, supra,* the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other.
>
> Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons . . . .
>
> In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may

> work injury to some private contractors, such parties gain nothing by having the United States as their defendants." (p. 461)

In *Froemming Bros. Inc.* v. *United States,* 70 F. Supp. 126 (C. Cls.) the Government contracted to furnish materials to plaintiff. The Government breached the contract by not making timely deliveries, due to the fact that the military had diverted the materials to war purposes. The plaintiff sued, and recovery was denied.

Nor is the rule changed because the sovereign interference takes the form of competitive contracts. In *Standard Accident Inc. Co.* v. *United States,* 59 F. Supp. 407 (C. Cls.), the alleged hindrance or interference was the result of the award of cost-plus fixed-fee contracts to other contractors in the contract area, as a result of which the contractor's labor force was drawn to the cost-plus contract projects, increasing the plaintiff's cost of performance. The court in disallowing the claim for increased costs said (p. 409):

> The allegation of the petition that "It was contemplated and understood that the Government would do nothing which would interfere or prevent the orderly and contemplated method of performing the contract" of September 14, 1940, cannot be taken as an allegation of fact well pleaded and admitted for the purpose of the demurrer that it was contemplated and understood by the United States *that it would not enter into such other contracts as might be deemed necessary* to carry out and fulfill the requirements of existing acts of Congress making provisions for the Na-

> tional Defense. * * * *the contract in suit contains no express stipulation or warranty that contracts on a cost-plus fixed-fee basis would not be made if necessary, and none can be implied.* Both parties knew of the existence of the National Defense and Appropriation acts of June 28, July 2, and September 9, 1948, and it must be assumed that in making the lump-sum contract of September 14, 1940, they knew also that the carrying out of those acts by contract, or otherwise, would be a sovereign act and not a breach of the contract then being made. Under the terms of the contract in suit, the contractor assumed the risk of meeting the changed conditions of which complaint is now made. (Emphasis supplied.)

Also see: *United States* v. *Beuttas,* 324 U.S. 768 (1945), reversing *Beuttas* v. *United States,* 60 F. Supp. 771 (C. Cls.).

In the instant case, the act complained of was a change[28] in the price support program, accomplished through purchase contracts intended to remove the balance of the surplus. That a price support program is of a sovereign nature seems self-evident. (See *United States* v. *Turlock Dehydrating & Packing Co.,* 116 F. Supp. 822, 838 (D.C. Cal.)). The program is not for profit, but is actually supported by public funds. It is not the type of activity which would be engaged in by an individual. It is public and general since its goal is to raise the general level of prices of a farm product. Even appellee must have recognized

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[28] Appellee participated in the changed program, contracting to sell an additional 2,000 tons of raisins to CCC in November (Defendant's Exhibit AA).

the sovereign nature of the price support program, for during the trial, and in its proposed findings of fact, the term "price support" was studiously avoided, appellee doggedly sticking to the term "purchase program".[29] Although the District Court adopted appellee's proposed findings, in its opinion the Court recognized the true nature of the program. The Court said (R. 51):

> As the federal foreign aid program diminished following the war and the Armed Forces returned to this country and were discharged, the wartime stimulated raisin industry found itself without a ready market for a large part of its product. *Government action appeared to be necessary to save the raisin grower. * * * The Department of Agriculture hoped that the general purchase program would enable dried fruit growers and processors to establish prices at a fair level.* (Emphasis supplied.)

At R. 57 the Court stated that the press release "culminated efforts on the part of all parties to stabilize the raisin market."

In any event, the docket[30] and the testimony (R.

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[29] Although Grady, official in the Company, and principal witness for appellee, and appellee's counsel repeatedly referred to the program as a purchase program, even Grady when off-guard made statements conceding that the objective of the program was price support (R. 171, 177, 248).

[30] The docket states that its purpose is to afford "*necessary price support* * * * during the period of adjustment" (Plaintiff's Exhibit 4 p. 2). The amendment which is the subject of this litigation increased the maximum raisin purchase to 126,000 tons, "if * * * such action would be required in order to carry on successfully the *price support program*" (Plaintiff's Exhibit 4, Amendment 1 to Docket OC-95a).

355, 357, 362-363, 480-481, 530) make it clear that price support was the object of the program [31] and that the money used came from funds appropriated by Congress for price support (R. 428).

Summarizing, the courts have consistently held that the Government is not liable in damages for its public and general acts, and price supports, along with minimum wages and protective tariffs, are parts of a legislative program designed to stabilize the domestic economy, not only for general welfare purposes, but to withstand demands made upon the economy in the support of our national defense and our foreign policy. The changes in the price support program being sovereign acts, appellant is not liable in damages unless there was a contract to reimburse appellee for such damages; and this brings us to the next issue.

II

There Was No Breach of An Implied Contract

Although the activities of the sovereign are Governmental in nature, and therefore, clothed in sovereign immunity, it is also true, of course, that the sovereign may and frequently does waive its immunity. Thus, under the Tucker Act the sovereign may be held liable for breach of contract, and under the Federal Tort Claims Act, for certain torts. The present action is based upon alleged breach of contract, and necessarily rests upon the assumption that although the changes in the price support program were of a sovereign character, CCC contracted to compensate The Com-

[31] The Governmental nature of the program is further suggested by the proposed usage of the Governmental purchased raisins for school lunches, foreign relief, the armed forces, and eleemosynary institutions (R. 357, 478).

pany for any damages which resulted from such sovereign acts. CCC made no express agreement for compensation and the District Court's judgment does not rest on any such base. The court ruled (R. 58):

> It was implied in the very nature of the transaction that the CCC would do nothing to prevent or hinder performance on the part of the plaintiff. (Citing United States v. Peck, 102 U.S. 64; Cf. Baily v. Railroad Co., 84 U.S. 95; Merriam v. United States, 107 U.S. 437, 444.) The drastic and radical departure of the government policy constituted a breach of the implied agreement with plaintiff. (Citing Fuller Co. v. United States, 69 F. Supp. 409; also Sunswick Corp. v. United States, 75 F. Supp. 221.)

The liability based on an implied contract could conceivably rest on two premises: (1) That by entering into contracts of purchase, CCC impliedly agreed to refrain from any action which would increase The Company's cost of performance; that CCC's amended program increased The Company's cost and appellant is liable therefor. (2) That the press release of September 5, 1947, and/or statements made by CCC officials constituted a promise by CCC to prospective vendors that the purchase of 1947 crop raisins would be limited to 61,000 tons, from which promise it can reasonably be implied that in the event of a change in program, CCC would compensate vendors for whatever damage was caused thereby.

The District Court's legal theory of liability is not entirely clear to appellant. Therefore, we shall briefly examine both possibilities.

As to the Implied Contract Not to Hinder Performance

It is true that contractors are obliged to cooperate (42 Col. L. Rev. 903), but the rule of cooperation does not prevent a buyer from entering into a competitive market. The Restatement of Contracts, Sec. 315, in illustrating this point gives the following example:

> 3. A contracts to sell and B to buy in the future a large quantity of Georgia pine. Before the time for performance B makes large purchases of Georgia pine from other parties, thereby making it more difficult for A to fulfill his contract. B has not committed a breach of contract. Risk of such hindrance as has occurred was assumed by A. If B's purpose in making other purchases was to corner the market, or otherwise hinder performance in ways or for purposes not within the risk assumed, he would have committed a breach.

In regard to this point, Williston states, (Contracts. Rev. Ed. Sec., 1293A, p. 3688):

> An exception to this principle must be made where the hindrance is due to some action of the promisor which under the terms of the contract or the customs of business he was permitted to take. Thus, if a party seeking to secure all the merchandise of a certain character which he could, entered into a contract for a quantity of the required goods, and subsequently made performance of the contract by the seller more difficult by making other purchases which increased the scarcity of the available supply, his conduct would furnish no excuse for refusal to perform the prior con-

> tract. An interesting comparison with such a case is suggested by several cases where one, owning a play subject to a contract to pay another a share of the profits from its production on the stage, sells to a moving picture company the right to produce a "talkie," thereby rendering slight the chance of profit from production on the stage. The hindrance was held a breach of implied duty. It was not a risk naturally and properly to be anticipated. [Williston on Contracts (Revised Edition), sec. 1293A, p. 3688.]

Corbin on Contracts (Sec. 947) declares that "where prevention or hindrance was reasonably necessary in carrying on a party's other business * * * and * * * which both parties contemplated the possibility of * * * when the contract was made" there is no implied contract.

The scope and effect of this rule can best be illustrated by reference to specific cases. In *United States* v. *Fidelity & Deposit Co. of Maryland,* 152 F. 596 (C. A. 2), it appeared that one Conklin had two contracts with the Government. One was to remove stone from a quarry leased by the Government, and the other was to furnish stone for construction of a Government breakwater. Conklin was using the stone taken from the leased property for the breakwater, as the Government knew. Nevertheless, the Government allowed its lease to expire, and Conklin alleged that this act released him from his obligation to furnish stone for the breakwater. The court stated (p. 599):

> The rule is elementary that where the parties have deliberately put their engagement in writ-

> ing * * * the writing is presumed to contain the entire contract, and all the prior and contemplated regulations are merged therein, and cannot be shown by parol evidence. The writing, it is true, may be read in the light of surrounding circumstances in order more perfectly to understand the meaning and intent of the parties * * *.[32]
>
> The contract was unambiguous, and the court below erred in making a contract between the parties by parol evidence which obligated Conklin to furnish the particular stone which he had contracted to purchase from the government, instead of any other stone which might be of the quality of the sample submitted with his bid. * * *
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> * * * * * * *
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> We have not overlooked the case of United States v. Peck, 102 U.S. 64 * * *. If it encroaches upon the rules to which we have adverted, its authority ought not to be extended to cases in which the facts are not practically identical.

In *Megan* v. *Updike Grain Corp.*, 94 F. 2d 551, (C. A. 8), cert. denied, 305 U.S. 663 (1938), Megan, the trustee in bankruptcy for the Chicago and Northwestern Railroad, sued to recover unpaid rental on a grain elevator in Omaha, Nebraska, leased to the defendant, and owned by the railroad. The defendant pleaded frustration, based on the fact that when the lease was executed the railroad rates encouraged the

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[32] In the instant case the contract provided (Art. 12): "no changes in the terms and conditions of the Contract shall be allowed unless the same have been ordered in writing by the Agency and a change in price, if any, has been stated in such order."

flow of grain into the Omaha market, but that after execution of the lease, plaintiff joined with other railroads in procuring new rate orders from the I.C.C. which resulted in the diversion of the grain from the Omaha market, making the grain elevator unprofitable to operate. The court, in overruling this defense, stated (p. 554):

> The railroad cannot on this account be accused of having violated the lease by making the lessee's obligation more burdensome. These additional charges were a part of general rate increase announced by all the carriers in that territory and applied to all shippers of grain. The Northwestern R.R., as lessor of the elevator, made no express or implied promise that it would refrain from joining the other railroads in a general policy which might react unfavorably upon its lessee's business.
>
> The movement of grain * * * varies with many factors which are as unpredictable as railroad rates, weather and crop conditions, *Government agricultural policy,* foreign markets, and general economical conditions are a few of them. *The loss of profits due to a sudden change in one of these factors is a risk assumed * * * in the absence of an express provision * * * to the contrary.* (Emphasis supplied)

The case most frequently cited in support of the "assumption of risk" rule is *Iron Trade Products Co.* v. *Wilkoff Co.,* 116 Alt. 150 (Pa.). The plaintiff in that case had a contract to buy 2,000 tons of a certain kind of rails from the defendant. Defendant failed to perform, alleging that plaintiff had bought the rails which defendant intended to purchase to fulfill his contract

with plaintiff. The Supreme Court of Pennsylvania upheld the trial court's ruling that the affidavit of defense was insufficient, saying:

> In effect, the affidavit of defense avers the supply of such rails was very limited, there being only two places in the United States (one in Georgia and one in West Virginia) where they could be obtained in quantities to fill the contract, and that pending the time for delivery defendant was negotiating for the required rails when plaintiff announced to the trade its urgent desire to purchase a similar quantity of like rails and in fact bought 887 tons and agreed to purchase a much larger quantity from the parties with whom defendant had been negotiating, further averring this conduct on behalf of plaintiff reduced the available supply of relaying rails and enhanced the price to an exorbitant sum, rendering performance by defendant impossible. The affidavit, however, fails to aver knowledge on part of plaintiff that the supply of rails was limited or any intent on its part to prevent, interfere with, or embarrass defendant in the performance of the contract; and there is no suggestion of any understanding, express or implied, that defendant was to secure the rails from any particular source, or that plaintiff was to refrain from purchasing other rails; hence it was not required to do so. The true rule is stated in Williston on Contracts, p. 1308, as quoted by the trial court, viz.:
>
> "If a party seeking to secure all the merchandise of a certain character which he could, entered into a contract for a quantity of the required goods, and subsequently made performance of the contract by the seller more difficult by making other purchases

which increased the scarcity of the available supply, his conduct would furnish no excuse for refusal to perform the prior contract."

Mere difficulty of performance will not excuse a breach of contract. Corona C. & C. Co. v. Dickinson, 261 Pa. 589, 104 Atl. 741; James v. Scott, 59 Pa. 178, 98 Am. Dec. 328; 35 Cyc. 345. Defendant relies upon the rule stated in United States v. Peck, 102 U.S. 64 26 L. Ed. 46, that—

"The conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance."

The cases are not parallel. Here plaintiff's conduct did not prevent performance by defendant, although it may have added to the difficulty and expense thereof. There is no averment that plaintiff's purchases exhausted the supply of rails, and the advance in price caused thereby is no excuse. The Peck Case stands on different ground. There Peck contracted to sell the government a certain quantity of hay for the Tongue River station, and the trial court found it was mutually understood the hay was to be cut on government lands called "the Big Meadows," in the Yellowstone valley, which was the only available source of supply, also that thereafter the government caused all of that hay to be cut for it by other parties, in view of which Peck was relieved from his contract.

These cases indicate that courts will not circumscribe the normal activities of a contracting party which may hinder the other party's performance, unless the evidence reasonably leads to a conclusion that the defendant had *agreed* so to limit his activities.

The proof of such a promise, be it express or implied, must rest on fact—not merely equitable considerations. *United States* v. *Minnesota Mutual Investment Co.,* 271 U.S. 212, 217; *Hales* v. *United States,* 113 F. Supp. 505 (Okla.); *Chicago Cold Storage Co.* v. *United States,* 57 C. Cls. 221, aff'd. 263 U.S. 677; *Cherrywood Apts., Inc.* v. *United States,* 98 F. Supp. 577 (C. Cls.).

Also analogous are the cases involving damages due to the sovereign acts of the Government. In such cases the parties have not been relieved of their contractual responsibility because of sovereign interference, the courts holding that the parties assumed the risk of such interference.[33] In *Columbia Railway and Power Co.* v. *City of Columbus,* 249 U.S. 399 (1918), the street railway obligated itself to furnish services to the city for 25 years at specified rates. Subsequently, the war started and the War Labor Board increased the wages

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[33] Somewhat parallel cases concern situations where expenditures were made by private contractors for the fulfillment of Government contracts. The contracts were terminated, and the contractors sued to recover their expenditures, claiming breach of an implied contract. The courts held the Government not liable. *Chicago Cold Storage Co.* v. *United States, supra; Hales* v. *United States, supra.* In the *Hales* case the court said:

> There is nothing in the contracts * * * that either expressly or impliedly can be construed that the defendant was concerned in any manner in the cost or maintenance of an airport. * * * under such contracts the mere fact that a contractor suffers a loss in his business venture does not entitle him to recover.

In the *Chicago Cold Storage Co.* case, *supra,* the court held—

> Our search for the things said or done out of which there may be erected the implication of a promise on the part of the United States to reimburse this expense is vain. * * * We find no element of obligation.

The court, in the latter case, indicated that the contractor, an experienced businessman, should have protected himself by express provisions in the contract, instead of expecting the court to strain implications out of the surrounding circumstances.

of plaintiff's employees to a point where the railway was not making money. The railway asked for an injunction against the enforcement of the ordnance which had fixed the rates and which constituted a contract between the parties. The court stated:

> it is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board. * * * That there might be a rise in the cost of labor, * * * might reasonably have been within their contemplation when the contract was made and provisions made accordingly. * * * it may be * * * a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such.

In *Lloyd* v. *Murphy,* 153 Pac. 47 (Cal.), the defendant leased certain premises for the establishment of an automobile agency. The war resulted in regulations restricting the production of automobiles. This seriously curtailed plaintiff's operations. The court nevertheless held that plaintiff was liable for the rent. It stated (p. 50) that in connection with the doctrine of frustration it must be ascertained whether the risk was "reasonably foreseeable". If so, the court held that provision should have been made for such a contingency in the contract, and further that "the absence of such a provision gives rise to the inference that the risk was assumed." The court found (p. 51) that there was no proof that the risk involved was an "unanticipated circumstance wholly outside the contemplation of the parties," and further stated,

> it cannot be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles was so remote a contin-

gency that its risk could not be foreseen by the defendant, an experienced automobile dealer.

Also see: *Browne* v. *Fletcher Aviation Corp.*, 155 Pac. 2d 896 (Cal.); *Frazier* v. *Collins*, 187 S.W. 2d 816 (Ky.), and *Thomson* v. *Thomson*, 146 N.E. 451 (Ill.) app. dis. 273 U.S. 638.

In the case at bar, as the subsequent discussion will demonstrate, it cannot be said that the change in program was an "unanticipated circumstance wholly outside the contemplation of the parties." Indeed, the possibility of change was patently The Company's major concern, since it was selling short.

We believe that the foregoing authorities make it clear (1) that the mere agreement to purchase a commodity from A does not foreclose the buyer from purchasing like commodities from other vendors, even though such competitive purchase results in increasing A's cost of performance; (2) that in the absence of persuasive evidence to the contrary contractors are presumed to have assumed the risk attendant upon the exercise of sovereign functions. Thus, had The Company here while in a short position sold to a private corporation, and had CCC as a sovereign then placed a large order of raisins for use of its armed forces, it seems most unlikely that The Company would be able to escape performance of its private contract by reason of the fact that the sovereign's purchase increased the market price of raisins.

Of course, if the Government in its contractual capacity prevents performance, the other party is excused from performance. *United States* v. *Peck*, 102 U.S. 65. This case appears to be the authority upon which the District Court in the instant action pegged its decision

and, therefore, deserves detailed analysis. There, plaintiff contracted to supply hay to an army fort. There was a mutual understanding by both the chief quartermaster (General Card) as contracting officer, and Peck that the 150 tons of hay to be cut and supplied by Peck to the Tongue River garrison in Montana territory was to be cut from the Government owned land at Big Meadows. General Card mistakenly believed there was a large quantity of hay available, although, in fact, there was actually not more than 1,000 tons. The Indians had destroyed all other sources of hay in the area. General Hazen, a post commandant in the area, under a vague telegram of instruction entered into a contract with another contractor for 1,000 tons of hay from the Big Meadows. Almost a week later General Hazen learned of Peck's contract and told his contractor to continue cutting the Big Meadows grass at his own risk. General Hazen later told General Card he didn't think Peck could comply with his contract. When Peck's man arrived at Big Meadows he found the hay being cut, and searched in vain for other hay. A number of other misunderstandings and misfortunes also existed with respect to Peck's contract. The Government withheld from the money due Peck for wood cut under his contract "over $40,000 for the non-delivery of 150 tons of hay." 14 C. Cls. Ill.

These facts led both the Court of Claims and the Supreme Court to conclude that the Government had prevented the performance of the contract, and that Peck's default was thus excusable.[34]

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[34] Attempts have been made by contractors to extend this ruling to other situations involving actions which increased the cost of performance, but without success. *United States* v. *Fidelity & Deposit Co., supra; Iron Trade Products* v. *Wilkoff, supra.*

Certainly the *Peck* case is not apposite. The *Peck* case was concerned with total prevention, involved violation of an express agreement, and was not a suit for affirmative relief. The instant action, if we follow the opinion of the District Court involves right to recover the increased cost of performance allegedly due to breach of an implied agreement.[35]

Nor are the other two cases cited by the District Court in support of its proposition that the drastic change of Government policy constituted a breach of the implied agreement in point. In *George A. Fuller Co.* v. *United States,* 69 F. Supp. 409, C. Cls., plaintiff entered into a contract with the United States for the construction of a building. The United States was to furnish the models needed for ornamentation. The Government's delay in furnishing the models held up completion of the project to plaintiff's material damage. Plaintiff sued and recovered. This case involves simply a common instance where a promissor cannot perform until something has been done by the promisee, and the court correctly concluded that there was an implied promise by the Government to furnish the models in time to permit performance within the period specified by the court. However, this situation is not parallel to the present case. CCC was obliged to do nothing (except issue shipping orders) as a condition precedent to The Company's performance.

In *Sunswick Corporation* v. *United States,* 75 F. Supp. 221 (C. Cls.), also cited by the District Court, the Government expressly bound itself to pay the increased

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[35] Two other cases cited by the District Court (*Merriam* v. *United States,* 107 U.S. 437, 444; *Baily* v. *Railroad Co.,* 84 U.S. 96) simply support the proposition that contracts may be interpreted in the light of the surrounding circumstances.

cost of wages ordered pursuant to "Executive Order No. 9250 and regulations issued thereunder." Wages were increased upon order of the Wage Adjustment Board pursuant to said orders and regulations. The court held that plaintiff was entitled to an adjustment under its contract. The court stated:

> The increased wage costs for which plaintiff seeks to be reimbursed resulted not from the Government's public and general act in setting up its wartime system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy, but rather from a specific order issued on a particular job by one agency of the Government, to wit, the Wage Adjustment Board, to whom the contracting agency, the War Department, had by a provision of its contract delegated authority to modify the specifications as to wage rates. (p. 228.)

> We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be non-actionable as an act of the sovereign. As shown in Bostwick v. United States, 94 U. S. 53, 69, 24 L. Ed. 65, the liability of the Government in such circumstances rests upon the contract and not upon the act of the Government in its sovereign capacity. (p. 228.)

This case is entirely irrelevant since in the instant matter we have no express contract to pay increased cost, but are attempting to determine if an implied agreement can be found in the surrounding circumstances.

Summarizing, we believe it incontrovertible that the mere execution of a contract to buy raisins from The Company did not impose any obligation upon CCC to refrain from buying raisins from other packers, even though such purchases might have increased the market price of raisins. The District Court, as we read its opinion, did not appear to predicate liability on any such notion of implied obligation. The Court's conclusion apparently rests upon the issuance of the press release, and the purported representations contained therein.

This brings us to the major issue of the case, to wit, was there a promise made by CCC to limit its purchase to 61,000 tons of raisins, upon which promise the packers relied to their damage?

As to CCC's Promise to Limit the Purchase of Raisins

The material facts may bear repeating at this point. CCC formulated a price support program which had for its purpose the removal of a substantial portion of an estimated dried fruit surplus, including raisins, and the subsequent realization of a stabilized market price of approximately $125-$135 per ton for raisins. CCC adopted a dried fruit docket which provided for the purchase of 61,000 tons of raisins, out of an estimated crop of 325,000 tons of which it was believed that only 225,000 tons could be absorbed in the competitive domestic market. The Secretary of Agriculture announced this program on September 5, 1947 by a press release issued in Albuquerque, New Mexico. The market did not respond as anticipated. The raisin growers refused to sell their crop at prices which were being offered by the packers and subsequently CCC amended its program by providing for the purchase of an additional 60,000 tons of raisins from either growers

or packers and by a further provision that packers selling to CCC *after* November 26, 1947, certify that they had paid the grower a minimum of $135 per ton.

The Company, probably the largest independent packer in California, had entered into contracts to furnish CCC 14,000 tons of raisins which contracts were executed before the program modifications were announced. The contracts are in the record as plaintiff's Exhibits 10 and 15. In their essence, they provided for: (1) Purchase by the CCC of 14,000 tons of raisins; (2) delivery of this tonnage in specified periods; and (3) payment for tonnage at agreed prices. There were also other terms relating to shipping points, carrying charges, quality, containers, markings, inspection, etc. The contracts did not contain any reference to the press release of September 5, 1947, or any statement or suggestion that the Government's purchase program would be limited to a certain quantity, nor is there any language of any description in the contracts from which such a limitation can be reasonably implied.

At the time of entering into the contracts, The Company did not have the raisins on hand to furnish the Government, but sold short in the expectation that prices would drop to a level which would permit them to perform the Government contracts without loss, (and probably with great profit). The Company contends that the second entry of the Government into the market strengthened prices and by reason thereof the raisins supplied to the Government cost The Company more than they would have cost had the Government adhered to its program as first announced.

After reviewing the factual background, the District Court stated (R. 58):

> Defendant suggests that plaintiff assumed the risk of a change in the government program. This is a misapplication of the doctrine of assumption of risk. The parties did not, nor could they, contemplate the possibility of government hindrance or interference with the raisin purchase program as outlined in the September 5th announcement.

First, let us analyze the statement that The Company could not have assumed the risk of a change in the program. This involves consideration of (1) the risks inherent in the price support operation (for if The Company knew or should have known of the possibility of a change in program, the risk was necessarily assumed); and (2) the factual representations made by CCC and allegedly relied upon by The Company.

The Inherent Risk

The announced objective of the program was to achieve prices which would be fair to both producer and consumer,[36] and the press release so stated. The program was not, as The Company knew, for the benefit of the packers (R. 171, 496). CCC at the time of formulating its plan had to rely on estimates of crop, domestic and foreign requirements, etc. It had no way of knowing whether the plan initially formulated would bring stabilized and fair prices. In view of these facts, known to The Company, how could it assume that the program, as initially formulated, would be rigidly adhered to, particularly in a year of transition.[37]

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[36] Plaintiff's Exhibit 4, and Smith had told the packers the Government would not let prices go to "pot." (R. 494).

[37] R. 359, 473, 482. In 1946 producers had received an average of $312 per ton, due to post war demand for California wines. In 1947 prices were less than one-half this amount.

Contrary to the expectations of CCC, the program did not result in fair prices to the grower (CCC's plan was to establish a price of $125 to $135 per ton (R. 248, 578-579, 448, 459). According to Grady, a Company official and the appellee's chief witness, prior to the Government announcement, he believed that prices, if left alone would have dropped to $80.00 per ton (R. 345). Following the announcement of the program, which contemplated the removal of approximately 60% of the estimated surplus, the market was "demoralized" and in "chaos" (Grady, R. 341-345, 183). In short, the plan was a failure, due, in part at least, to the packers' failure actively to enter the market (R. 410, 501).

CCC did not, as appellee now alleges it was committed to do, sit on its collective hands. CCC was charged with the duty of protecting the economy, and it quickly revised the plan to fit the exigencies of the times. Modifications from time to time increased total dried fruit purchases to 283,000 tons, instead of the 133,000 tons originally announced (Plaintiff's Exhibit 5). The record is silent as to what profit plaintiff made from this increased purchase program in other dried fruits, but as Senator Anderson pointed out, The Company was delighted with the program for prunes, since it was in a long position, but very unhappy with the raisin program because it was short. (R. 466).

Thus, we have a price support program designed for the benefit of the farmer, a program which had fallen far short of its goal, all of which was known to The Company before submitting its bid; and despite the imperative requirement of flexibility in programs of this nature, predicated as they are on a large number of variables, the District Court found that the parties did not and could not contemplate a modification. This

conclusion is beyond comprehension, unless we find some representation by CCC that there would be no change of program.

The Factual Representations

The press release stated:

> Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.
>
> The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.
>
> Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.
>
> Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.
>
> The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.
>
> Department officials stated that the program should enable the dried fruit industry to complete

its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of dried fruit surplus problems.

This press release was not intended as a contractual commitment by the appellant (R. 458-459, 471). Nor was it so regarded by The Company. Grady stated that the press release was merely a devise for announcing the programs of the Department of Agriculture (R. 313, 316; See *Harlingen Canning Co.* v. *CCC,* 93 F. Supp. 45, aff'd. 193 F. 2d 176, C. A. 5). It was not "a basis upon which any commitment is made by the vendor" (R. 316); and The Company did not base its bids upon the press release but upon (1) the announcement requesting bids (Plaintiff's Exhibit 4) which announcement did not contain any reference to the press release or to the contemplated maximum purchase, and (2) upon alleged statements of Government officials that no change was contemplated in the program (R. 370, 375, 379, 383-384; Plaintiff's Exhibit 8). As a matter of fact, following the press release, Grady and other interested parties were continuously pressuring CCC to modify the program, which indicates that the press release was not regarded as a fixed contractual commitment.[38] A packer, Mr. Kluge, telephoned Smith following the press release to determine whether CCC would confine its purchases to the quantities set out in the press release. Smith told him that he did not know whether CCC would buy more than the quantities stated (R. 498). Then Kluge presumably relayed this to

[38] Despite the testimony of Anderson, Secretary of Agriculture, and Grady that the press release was not intended or believed to form the basis of a contract, the District Court found that the press release was issued with contractual intent (R. 70-71).

Grady. Grady promptly suggested that CCC modify the program and allow fixed prices under the Webb-Pomerene Act (R. 184, 500, 646; Plaintiff's Exhibit 6).

Grady also kept in touch with the contracting officer for the purpose of securing information concerning possible changes in the program (R. 193); and he talked with a Mr. Myer in the Department of Agriculture, who allegedly told him that there was little likelihood of change (R. 376, 378), thus indicating knowledge of the possibility of change.

In fact, there was no representation by any one that the program would not be changed and, in the final analysis, as Grady conceded, appellee's theory of misrepresentation rests upon a telegram sent by Smith to Grady in response to Grady's recommendation that the Webb-Pomerene Act be employed. Smith rejected Grady's proposal in the following language (R. 194, 198-199, 370, 379; Plaintiff's Exhibit 8):

> In speech at Fresno August 4 and press release issued Albuquerque September 5, Secretary stated that Dried Fruit prices would not be supported at fixed level. Announcement of prices to be paid by CCC or arrangement under Webb-Pomerene act would be contrary to Secretary's statement. The program as announced is substantial contribution toward stabilized conditions within Dried Fruit Industry. We solicit and expect receive cooperation Rosenberg and other packers in making it a success.

Although Grady repeatedly referred to the wire as a representation that the CCC program would remain unchanged (R. 199), the telegram is clearly nothing more than a request for cooperation with the then an-

nounced program, and contained no statements from which a promise not to amend the program can be implied.

Following receipt of the telegram, The Company did not regard the program as rigid. The growers were continuing their violent opposition to the program (R. 204.). Grady admitted that there were rumors of a change in the program [39] and The Company recognized the hazards implicit in a situation, where one is selling short (R. 207). If the growers were successful in securing a change "we might be required to pay $150 a ton for raisins" (R. 205). On September 30, Mr. Grady sent a memorandum to his superior in The Company stating (R. 311, Defendant's Exhibit B):

> For what it is worth Cobarley [Corbaley] says "Agriculture seems determined not to buy dried fruit appreciably above levels established in first acceptance of bids, *but what Washington may do is always a gamble.*" (Emphasis supplied).

On October 8, Mr. Grady sent a letter to a Mr. Cooper, (Defendant's Exhibit AH) which mentioned "The uncertainty that has been engendered by the Government's purchase program and the uproar which has accompanied it and which is apparently continuing." And then said:

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[39] R. 219-220. There was more than a rumor of change. On October 8, the docket was amended, although the public announcement by the Department of Agriculture was not issued until October 14. However, Senator Downey was informed of the change several days earlier and his prediction that there would be a change was printed in the "Fresno Bee", (Defendant's Exhibit P, Q) the leading newspaper in the same town in which The Company maintained its buying office, and which news releases, according to Senator Downey, must have come to the attention of The Company (R. 140, 141).

> It is clearly evident that this continuing uproar serves as a deterrent to the trade which is unable to appraise its possible effects—*indeed, no one even here in California seems able to predict the Government's future course of operation.* Today substantially the Government "is the market" and, of course, no one is willing to entirely miss the market. (Emphasis supplied).

This evidence makes it clear that The Company was not unmindful of the right of the Government to change its policies and program, and of The Company's risks in view thereof. The short of it is that The Company consciously gambled on price fluctuations when it entered into the contract with CCC. The gamble did not pay off, and there is nothing in the evidence before this Court which would justify a finding that the Government had promised to protect The Company against a rise in price *when such rise in price was the immediate purpose of the program.*

The court might wonder why The Company would offer to sell raisins at the stipulated prices in view of the possibility of a change in the Government purchase program; and particularly, why The Company would sell short in the face of the manifest uncertainties. The answer is that at the time the Government "was the market," and The Company did not want to miss the market (Defendant's Exhibit AH). But why did The Company bid a price *below the market?* [40] Because, as Mr. Arnold, vice-president of The Company, testi-

[40] The evidence shows that The Company's bid was based on purchases at $110 per ton, and that on September 11, 1947, the day following Amendment No. 1, The Company was offering $125 per ton for raisins (Defendant's Exhibit N, p. 15).

fied, Mr. Oppenheimer "made the statement that he felt that Sun-Maid would have difficulty in selling their raisins of that crop and therefore it would be apt to name a very low price, and in order for us to qualify under the bid it would be necessary for us to bid a price lower than the then prevailing market to the domestic trade"; and that he agreed with Mr. Oppenheimer (R. 586). This testimony was not contradicted, and Mr. Oppenheimer's statement was made in the presence of a number of people whom Mr. Arnold named (R. 585).

One pragmatic test for determining the existence of a contract implied in fact is to ask the question—Had the parties given consideration to the question at issue, would they have been willing to include in the written contract the promise which is allegedly in the contract by implication? In short, would the CCC have expressly agreed to limit the program to 61,000 tons? We think the answer is not obscure. Since CCC had no way of knowing whether the contemplated purchase would achieve a reasonable price, it is inconceivable that it would have consented to any such restriction.[41]

Nor is it conceivable that CCC would have agreed to compensate the packers for any loss resulting from a change in program. In this connection, it should be

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[41] The uncertainties connected with the program, and consequent necessity of maintaining a flexible position is suggested by the history of the docket. The price support program as originally drafted contained two proposals, one, the purchase program herein involved, and the other, a subsidy program under which it was proposed to subsidize the export of an additional 80,000 tons of raisins. This subsidy program was tabled by the Board of CCC (R. 531-537). However, suppose that in October CCC reconsidered and adopted the subsidy proposal, an action which might have affected the market price, would CCC have been liable therefor?

remembered that CCC had no control over The Company's response to the invitation to bid. The Company could refuse to bid. The Company could offer to sell only that quantity of raisins already priced by the grower; The Company could offer to sell to the Government at prices which would enable it to purchase raisins from the growers at prices at which they were willing to sell. The Company could sell short at prices above, below, or at the market level. In actuality, The Company here sold short at prices below the market in the expectation that prices would drop. In view of the complete control The Company had with respect to its own course of conduct, it would be entirely unreasonable to imply that CCC had agreed to underwrite The Company's operations irrespective of the method employed. The program was an attempt to siphon off surplus and, thus, to establish a reasonable price level for raisins. It was not for the benefit of the packers, but for the farmers. (R. 496).

Furthermore, being experienced in the business (and price support has been the rule in the dried fruit industry for many years), The Company, had it desired the kind of protection which it now asks the Court to paste together out of the "surrounding circumstances," should have made provisions for compensation or other relief in the event of change. In the case of *Shedd-Bartush Foods of Illinois, Inc.* v. *CCC,* 135 F. Supp. 78 (D. C. Ill. 1955), which involved a suit against CCC to recover losses due to a rise in the price of tallow, plaintiff deliberately took the gamble on price changes, and the court commented, in denying relief:

> There are available devices, by inclusion of escalator clauses or cost-plus-fixed-fee provisions, to

enable the contractor to shift to the government risks inherent in price changes.

The Authorities

When dealing with implied in fact contracts, it is seldom, if ever possible, to cite authorities directly in point. The decision in each case depends on the particular facts therein involved. In the instant action there is no pretense that CCC promised The Company compensation for such losses as a change in program might produce. The appellee's case, and the District Court's decision, appears to be founded upon a premise, (1) that CCC promised to limit its purchase to 61,000 tons, (2) that The Company sold short in reliance upon this promise, and (3) that CCC's promise to limit purchases carried with it an implied promise to respond in damages if the direct promise was breached. The nub of the case is, therefore, the existence of a promise to limit purchases to 61,000 tons. There is no evidence of any "representation" other than that contained in the press release of September 5, and, hence, the disposition of this case, in essence, depends upon the interpretation of that release. Was it a contractual commitment, or was it an announcement of governmental policy?

In searching out the contractual intent the courts have given short shrift to the argument that implied contracts can be spelled out of legislation and governmental policy determinations. In *Cherrywood Apts., Inc.* v. *United States,* 98 F. Supp. 577, C. Cls. (1951), the Government built temporary housing projects under the Lanham Act. The Act subsequently was amended to provide for the expeditious removal from the housing market of all such temporary buildings.

Plaintiff built apartments believing that the Government project would be quickly closed. However, the Government operations continued for some time. Plaintiff brought suit to recover for breach of implied agreement not to compete with private housing. The Government's demurrer was sustained. The court stated:

> The various expressions of Congess were what they purported to be, acts of legislation, and not statements implying promises that governmentally constructed housing would not be permitted to compete, even temporarily, with private housing to the prejudice of the latter.

In *R. F. C.* v. *MacArthur Mining Co.,* 184 F. 2d 913 (C. A. 8, 1950) cert. den. 340 U. S 943, reh. den. 341 U. S. 917, two letters written by the President of the United States and Donald M. Nelson, Chairman of the War Production Board, stated that it would be Government policy to pay prices for war metals which would yield a fair return to the producer. The plaintiff, alleging that these letters constituted an offer which it had accepted, sued to recover the alleged fair price of its product. The District Court held that the letters assured a margin of profit, and that the Government was contractually bound. The Court of Appeals reversed and stated (p. 196):

> We think the court was mistaken in thus construing these letters. They purported only to announce a policy of the government, and the presumption is that they were "not intended to create private contractual or vested rights * * *," Dodge v. Board of Education, 302 U. S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57, and he who asserts the crea-

tion of a contract in such a case has the burden of overcoming the presumption.

* * * * *

A government "policy" does not give rise to a contract in and of itself. The announced policy does no more than to authorize the appropriate government agency to enter into a contract consistent with the policy, and in entering into a contract thus permitted the agency is bound to observe and comply with the provisions of the statutes and regulations applicable.

The refusal of the Court to restrict, by implication, the exercise of Governmental functions is well illustrated in the case of *Knoxville Water Company* v. *Knoxville,* 200 U. S. 22. There the plaintiff corporation entered into a contract to furnish water to the municipality for a stated period of thirty years. Before the expiration of said period, the municipality determined to operate its own water system. Plaintiff brought an injunction to prevent such competition. The court, in holding for the city cited *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 547, 548, stating (pp. 33, 34, 35):

"The Government having entered into a contract * * * is not by means merely of implications and presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such contract must operate against the adventurers and in favor of the public * * * and that it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created * * *. The authorities are all agreed that a mu-

> nicipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings * * * It is said that the company could not possibly have believed that the city would establish waterworks in competition with its system, for such competition would be ruinous to the Water Company, as its projectors, on a moment's reflection, could have perceived when the agreement * * * was made.

It was held that—

> "the stipulation in the agreement that the city would not at any time during the thirty years * * * grant to any person or corporation the same privileges it had given to the Water Company was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own."

Also see Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379.

In *Williams* v. *Wingo,* 177 U. S. 601, a statute forbad a county to establish a ferry closer than one-half mile to any other ferry. The plaintiff contended that this act was a contractual commitment, and that later acts permitting closer competition were an impairment of contract. The court held for the defendant, stating that the acts in question did not "tie the hands of legislation, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the State is only created by clear

language and is not to be extended by implication beyond the terms of the statute." [42]

In the recent case of *United States* v. *Binghampton Construction Co.,* 347 U. S. 171, suit was filed to recover costs of performance allegedly increased by the Government's misrepresentation of fact, under the following circumstances. The Davis-Bacon Act provides for a minimum wage scale in Government projects based upon the wages determined by the Secretary of Labor to be prevailing. The plaintiff adopted the scale submitted by the Secretary of Labor pursuant to the Act, and then discovered that the prevailing wages were, in fact, higher. The Court of Claims gave judgment to plaintiff, holding that the schedule furnished by the Government misrepresented the facts (107 F. Supp. 712). The Supreme Court reversed, holding that the Davis-Bacon Act was for the benefit of employees of Government contractors, and that the schedule was not a contractual representation to the employer but was only intended to establish a minimum wage level.

Likewise in the instant case, the announced program —intended to benefit the grower—was not intended to commit the Government to a rigid policy, and should not be converted by this court into a contract with the packers.

Conclusion

The Company, upon learning of the CCC program

[42] Also see: Charles River Bridge v. Warren Bridge, 11 Pet. 420 (1837); Turnpike Company v. The State, 3 Wall. 210 (1865); West Tennessee Power & Light Co. v. City of Jackson, 97 F.2d 979 (C.A. 5, 1938), cert. den. 305 U.S. 625; Ohio Electric Power Co v. Village of Oberlin, Ohio, 9 F. Supp. 469 (D.C. N.D. Ohio 1933); Fort Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S.W. 975 (1910).

to purchase 61,000 tons of raisins, made efforts to secure a modification. The Company was unsuccessful. It knew that the growers were also making intensive efforts to secure a change, and concluded that they would also fail. Believing that the price of raisins would decline sharply, The Company in response to CCC's offer to buy, sold 14,000 tons, while in a short position. The Company gambled on a supposition that the Government would not provide further price support.

The Government's action in modifying a program which was not effecting the price support objective was a reasonable exercise of its Governmental function, and is not a basis upon which liability for damages can securely rest.

III

The Appellee Has Waived the Government's Alleged Breach of Contract

The appellant has two points to make with respect to waiver:

1. That The Company's conduct in performing the contract after full knowledge of the breach and before any loss had been sustained constituted a waiver.

2. That The Company's conduct in inviting an amendment to the contract and performing the amended contract with knowledge that the Government understood the contract to be fully binding on both parties waived the alleged breach.

As to Performance after Knowledge of Breach

The contracts in question were executed on September 25 and October 14, 1947. Delivery was to be made in the period October 1947-January 1948. De-

fendant made its first call for raisins on October 16 and frequently thereafter (Defendant's Exhibits V, W, X). The Company, as previously stated, had sold short and with the market price rising made no effort to buy raisins to fulfill the Government contract (R. 63-64). As a matter of fact, The Company did not even treat the Government contracts as "sales", instructing the bookkeepers to only enter the contracts on the margin of The Company's trading book. These marginal entries were maintained until January 30, 1948, when for the first time The Company treated the contracts as an actual sale in their books (R. 322, 323, 328). In any event, The Company advised CCC that it did not have raisins available and consistently refused to furnish raisins through the period October-December 1947. The breach of contract, if it occurred, took place on October 14, October 17 and November 26, when the changes in program were announced. During that entire period The Company was only purchasing raisins for its commercial customers, the Court finding that Government purchases commenced in the latter part of December (R. 63-64). The Company had suffered no damage up to that point and would have suffered no damage at all if it had rescinded the contracts, which counsel had apparently advised The Company was its right (R. 294-295, 338).[43] Instead of rescinding without damage to itself, The Company undertook to perform the contract, and this action created the loss appellee now seeks to recover.

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[43] Appellee had not purchased any raisins and had anticipated no profit on the Government contracts (R. 196, 209-210, 218, Def. Exh. 21) according to its own witnesses (appellant doubts the sincerity of such testimony as to profit, but it is binding against appellee).

It is well settled that under such circumstances the doctrine of waiver applies. *Monad Engineering Co.* v. *United States,* 53 C. Cls. 179; *Board of Trustees* v. *O. D. Wilson Co.,* 133 F. 2d 399 (D.C.A.); *Dubois Construction Co.* v. *United States,* 98 F. Supp. 590 (C.Cls.); *Baltimore & Ohio Railway Co.* v. *Jolly Bros. & Co.,* 72 N.E. 888 (Ohio); *Simon* v. *Goodyear Metallic Rubber Shoe Co.,* 105 F. 573 (C.A. 6); *H. E. Crook Co.* v. *United States,* 59 C.Cls. 593, aff'd. 270 U.S. 4, 13 A.L.R. 2d 856.[44]

In *Simon* v. *Goodyear Metallic Rubber Shoe Co., supra,* plaintiff had for many years been buying old rubber and selling it to manufacturers. An agency of defendant urged plaintiff to contract for 250 tons of rubber and, when plaintiff expressed reluctance to contract for such a large amount when he carried no stock and would have to buy in the market to fill the contract, defendant stated that a large buyer was going out of business and the price in the market would surely be lower. Plaintiff contracted to supply the rubber. In fact, there was heavy competition for rubber and the price rose. Plaintiff conceded that he learned of this activity in the market before he made his first delivery, and that he knew that the concern which defendant had represented as going out of business was in fact actually bidding. Plaintiff then finding that he could not buy to fill his contract except at a loss, made efforts by correspondence and personal

[44] Cf. *Warren* v. *Stoddart,* 105 U.S. 244, where the Court said, "The rule is that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions it is his duty to do it, and he can charge the delinquent with such such damages only as with reasonable endeavors and expense he could not prevent."

intercession, to obtain some concession in quantity or some advance in price. Failing in this, plaintiff notified defendant that he would carry out his contract, and hold defendant responsible, in an action for fraud and deceit, for the loss he might sustain. Plaintiff continued to buy and make deliveries, obtaining a concession in respect to deliveries, and received payment at the contract price, sustaining an actual loss of $4,000. He sued.

The court in denying recovery stated (p. 579):

> * * * in an action by one who has been fraudulently induced to make either a contract of sale or purchase, it must follow that if one, after full knowledge of the fraud and deceit * * * goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is *voluntarily incurred.* The maxim *volenti non fit injuria* has application to all loss resulting from the voluntary execution of a nonobligatory contract with knowledge of the facts which render it voidable.

The reason for the rule is simple equity. A party, even though aggrieved, does not have the right to take action which will serve only to cause damage to the other party. Here, if as appellee contends, there was a breach of contract which justified nonperformance, then The Company's election to perform, not the appellant's breach, created the damage. Cf. *Morgan* v. *McKee,* 77 Pa. 228, 231, *Leaming* v. *Wise,* 73 Pa. 173.

This principle of waiver was not mentioned in the opinion of the District Court, although it had been presented in the defendant's brief. The District Court stated:

With respect to the defense of waiver of rights, plaintiff's conduct at the end of January, 1948, in arranging for shipment under the contract requirements did not in itself waive any rights arising by reason of the CCC's breach. The express waiver under the January modification dealt solely with subsidiary matters of storage charges and delayed shipment. Plaintiff preserved its rights. Defendant has the burden of proving waiver (F.R.C.P. (8)(c)), and has not discharged this burden.

The series of events leading up to the final shipment of raisins indicate an effort on the part of plaintiff to renegotiate or cancel the contracts. They do not point to waiver. Delivery itself following defendant's breach does not constitute a waiver of a damage claim. (Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F. 2d 488). Nor did acceptance of payments under the contract constitute a waiver. (Blair v. United States, 147 F. 2d 840).

Thus, it seems apparent that the Court only concerned itself with the question of whether The Company had consciously abandoned its right to recover damages for the alleged breach. Even here appellant submits that the Court was in error.

As to The Company's Subsequent Agreement to Perform at the Contract Price

The law is settled that if a party, following a dispute as to the price due, performs the contract, and accepts the stipulated price, he cannot then claim damages. *Early & Daniel Co.* v. *United States,* 271 U.S. 140; *Willard Co.* v. *United States,* 262 U.S. 489, *Nel-*

son Company v. *United States,* 261 U.S. 17, *Savage* v. *United States,* 92 U.S. 382, and *Francis* v. *United States,* 96 U.S. 354. Also see *N.Y., N.H. & H. R.R.* v. *United States,* 251 U.S. 123, *White Oak Coal Co.* v. *United States,* 15 F. 2d 474 (C.A. 4) cert. den. 273 U.S. 756, and *P. W. Brooks & Co., Inc.* v. *North Carolina Public Service Company,* 37 F. 2d 220 (C.A. 4) cert. den. 281 U.S. 741.

In the *Early & Daniel Co.* case, *supra,* plaintiff claimed that for hay delivered in excess of the contract amount it was entitled to the market price. The Court said (p. 142):

> The appellant had the option of delivering the remainder of the hay under the terms of the contract, or of not delivering it at all, if the contract had been broken. It chose to deliver. It made a protest, but that was ignored by the officers of the Government, and, when the Government tendered the contract price, it was accepted by the appellant and without protest.

The Court went on to say that under the circumstances there was no ground for implying a contract to pay more than the contract price.

In *Savage* v. *United States, supra,* the plaintiff insisted that it had a right to have treasury notes redeemed in gold, whereas the United States would give only legal tender notes. Plaintiff accepted the legal tender notes under protest. The Court, at pp. 385-386, stated:

> * * * but the whole record shows that it was an honest difference of opinion between the secretary and the decedent as to the rights of the parties, and

> that it terminated by the voluntary acceptance of the legal-tender notes on the parts of the agents of the decedent, in lieu of gold, * * *. Such an acceptance of payment was a waiver of the claim antecedently made, and amounted to a full discharge of the same, * * *.

Plaintiff's "protests * * * did not * * * qualify the voluntary acceptance of the terms proposed by the Secretary and the absolute and unconditional surrender of the securities to the United States."

Cases involving waiver,[45] estoppel and accord and satisfaction are legion—but the advantage to be gained from any extended analysis of such cases is dubious, since each case must be decided upon the particular circumstances there present. The facts of the case at bar, as briefly as it is possible to state them, are as follows:

1. The Company contracts provided for delivery, commencing in October. The Company refused to make delivery, stating that it had no raisins available for delivery to the Government. The price of raisins apparently precluded The Company from fulfilling the Government contracts except at a loss, which it was not prepared to assume.

2. In January 1948, the price of raisins declined to a point where The Company could purchase raisins and fulfill their contracts without loss, and probably with a substantial profit (App. C.). The Department of

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[45] The two cases cited by the District Court (R. 60) are not contrary, standing for the proposition that upon breach of contract, the injured party may rescind or perform, and sue for damages. This rule does not have much bearing on the present issue. Furthermore, in the instant action, The Company did not continue performance. It breached the contract by refusing to make delivery in the contract period.

Agriculture on January 21, 1948, (Plaintiff's Exhibit 29) thereupon notified The Company that it expected delivery under the terms of the contract (undoubtedly acting on the belief that in view of the then existing price of raisins, The Company could perform without suffering any damage).

3. On January 22, The Company wrote to the contracting officer as follows (Plaintiff's Exhibit 30):

> Please be referred to our contract A6pm(Ff)-1647 covering 6000 tons Domestic Pack and 4000 tons Export Pack Thompson Seedless Raisins.
>
> Because of our inability to secure the raisins, due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement of raisins into our Fresno plant, and because of our failure to secure any relief from Washington we were unable to make delivery on shipments totaling 5,718 tons Domestic Pack and 699,990 lbs. Export Pack.
>
> We are now in a position to make deliveries against this contract, and it is our understanding that before the Shipping and Storage Branch can instruct shipment against this contract, it will be necessary to issue an amendment reinstating this tonnage and extending the delivery date.
>
> We will appreciate it if you will furnish such an amendment.

At the time of this letter, natural raisins were being quoted at $105-$110 per ton which would have enabled The Company to purchase raisins and to perform its Government contracts without loss (App. C).

4. On January 26, the contracting officer wired The Company pointing out in detail The Company's de-

faults in delivery and stating further as follows (Plaintiff's Exhibit 32):

> We should like to know whether you will deliver if you receive other notices to deliver, provided that no damages for non-delivery will be sought by Commodity Credit Corporation other than the waiver by you of all carrying charges on raisins covered by Contract A6PM(FF) 1647.
>
> Therefore, please advise us as to your intention with reference to delivering the quantities of raisins under the above mentioned contract as well as under Contract A6PM(FF) 1893.
>
> We are willing to take delivery on all of the quantities covered by both the above mentioned contracts *at the contract prices.*
>
> In accordance with recent advice received from Washington, D. C. *these prices will not be raised* except that the 12,000,000 pounds sold pursuant to Contract No. A6PM(FF) 1647 in domestic containers shall be packed in export containers at an increase in price of $0.0005 per pound.
>
> We will not pay carrying charges on any raisins covered by Contract No. A6PM(FF) 1647.
>
> This telegram is sent without prejudice to any rights of Commodity Credit Corporation.
>
> If this arrangement is agreeable to you please indicate your agreement therewith by advising us not later than 500 PM January 28, 1948.
>
> Otherwise please indicate your intention as to your performing on these contracts. (Emphasis supplied)

5. The evidence shows that Grady telephoned the contracting officer on January 27 and requested the con-

tracting officer for permission to answer the telegram of January 26 with a qualification such as "without prejudice to our rights regarding our conversation with the Secretary."[46] In a conversation the next day, the contracting officer advised Grady that he could not issue shipping instructions if such a qualification were added, because any such proposal would have to be submitted to Washington for consideration. He further advised Grady that any such qualification might result in delay and would not have too much chance of being accepted (R. 605-610). This testimony of the contracting officer was supported by his contemporaneous notes (Defendant Exhibit U).

6. On January 28, The Company responded by telegram as follows (Plaintiff Exhibit 33):

> Retel January 26th: This Confirms Our Agreement to Extend Period for Shipment as Outlined Your Wire. Will Appreciate Receiving Prompt Shipping Instructions—

On the same date a second telegram was sent by The Company to the Contracting Officer which read as follows (Plaintiff's Exhibit 34):

> Supplementing Our Today's Wire We Are Agreeable to Conditions Your Wire For Packing 12,000,000 # Raisins in Export Containers at Price Increase of $0.0005 Per Pound. Also it Is Our Intention to Deliver Raisins under Contract A6PM (FF) 1893.

7. After receiving the two telegrams of January 28, 1948, Mr. Allmendinger had a further telephone con-

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[46] Grady had discussed The Company's situation with the Secretary of Agriculture and hoped to receive a price increase through negotiation (R. 422-423, 254).

versation with Mr. Grady on January 29, and told him that "it was possible to construe the first wire received from him on January 28th as not agreeing completely to ship and waive carrying charges on contract 1647 if the delivery notices were issued. That is he was agreeing only in part." Allmendinger suggested that this construction would not be possible "if a wire was sent stating that if delivery notice is issued against fruit covered by 1647, Rosenberg agreed to ship such fruit and waive carrying charges, provided our telegram January 26th. Mr. Grady stated at that time that he would send a wire containing substantially that language" (R. 613).

8. Under date of January 29, Mr. Grady on behalf of Rosenberg sent Mr. Allmendinger a telegram as follows:

> Pursuant our wires 28th reference contract A6pm (Ff)-1647 we confirm conversation. If delivery notice is issued against fruit covered by this contract we agree to ship such fruit and waive carrying charges as provided your wire January 26th.

9. CCC issued shipping instructions and the raisins were delivered in February and March 1948 (Plaintiff Exhibits 42, 43).

10. Rosenberg thereafter proceeded to bill the Government for the raisins delivered under the contracts, as amended, upon standard voucher forms certifying that the bills thus presented were correct and just and that "all conditions of purchase applicable to the transactions had been complied with." No reservations whatsoever were contained in the voucher forms (Defendant's Exhibit Y, which has been stipulated (R. 635-636) to be typical of all the vouchers submitted by

Rosenberg). Rosenberg accepted payment of the vouchers.

From these facts, it is necessary to determine whether The Company agreed to perform the contract at the stipulated price, thus waiving the breach. It will be noted that the contracting officer specifically agreed to accept late delivery *"at the contract prices"* (Plaintiff's Exhibit 32), and stated pointedly that the contract prices *would not be raised* except in a minor particular relating to the type of container to be employed. (Plaintiff's Exhibit 32). Further, the contracting officer rejected Grady's proposal that the reinstatement of the contracts contain a provision reserving to The Company the right to assert a claim; The Company specifically complied with the terms of the reinstatement; delivery of 14,000 tons of raisins was promptly made; The Company billed and was paid the modified contract price.

The waiver of the alleged breach, the appellant submits, follows not only from the express consideration and rejection of The Company's proposal that the modified contract reserve appellee's right to press for a higher figure, but from the fact that the Government in accepting the modification waived its right to claim damages due to non-delivery in the contract period. This constituted a new consideration for performance by plaintiff. Williston, Contracts, Rev. Ed. Sec. 135. Cf. *Bransford* v. *Regal Shoe Co.,* 237 F. 67 (C. C. A. 5). A contractor cannot at the same time accept the benefits of the contract and reject its responsibilities. *Nassoiy* v. *Tomlinson,* 42 N. E. 715 (N. Y.); *Willard Co.* v. *United States,* 262 U. S. 489; *American Rolling Mill Co.* v. *United States,* 60 C. Cls. 882, 894, cert. denied 269 U. S. 567; *Kentucky Natural Gas Corp.* v. *Indiana Gas*

& Chemical Corp., 129 F. 2d 17, cert. den. 317 U. S. 678; *Mason* v. *United States,* 84 U. S. 67.

In the *Willard* case, *supra,* the Navy ordered coal and the plaintiff protested, requesting the Navy to leave the price open. The Department declined and the plaintiff furnished the coal. The court in holding the plaintiff to the contract price, stated

> by the conduct and performance of the parties the contract was made definite and binding as to 110,000 tons ordered and delivered according to its terms.

In the *American Rolling Mill* case, *supra,* the Government ordered material. Plaintiff wanted payment for the inspection charges, and was told that he would not be paid. Nevertheless, he shipped the material. The court, in holding plaintiff to its contract stated:

> The plaintiff therefore fulfilled the contract knowing what price the government expected to and would pay, and that it would not cover compensation for inspection. Plaintiff can recover, therefore, only the contract price, which has been paid to it.

The District Court seemed impressed with the equities in favor of The Company. We believe that the Court may not have taken note of the equities favoring CCC. Here was a price support program designed to stimulate purchases and to stabilize prices at a level not ruinous to the grower, as The Company knew. The Company instead of offering the cooperation requested, did everything in its power to beat down the price. For example: (1) It bid prices below market (R. 586), and thus, to come out even, was forced to try and defeat the program, (2) it ordered its buyers to stay

out of the market for a period of several weeks, (Defendant's Exhibit N, pp. 15-17) when ordinarily it would be buying heavily (R. 202), (3) when it did buy, it bought on open price contracts, because the prices it offered were not acceptable to the grower, and because The Company believed that competition would drive the price down (R. 204). The open price contract removes buying power from the market, and has a price depressing effect, as Smith and Arnold, former Vice President of The Company, testified (R. 523, 587-588). (4) Although the purpose of the program was to get the packers into the market, The Company did not buy any raisins for the CCC contracts until late December (R. 63-64), (and did not record the CCC contracts as sales until January 30, 1948). (5) When The Company finally agreed to deliver the season was drawing to a close, and the price of raisins had dropped to $100-110 a ton, and remained at this level for several weeks (App. C). The contracting officer honored the CCC contracts, despite non-delivery believing that the reinstatement was at the contract price. Had The Company been forthright and rescinded the contract, the Government could have covered its commitments without additional expenditures. Instead, The Company agreed to reinstatement at the contract price, and having received full payment, filed suit. The Company, as the expression goes, wants to have its cake and eat it too. We submit that there should be no recovery.

IV

Appellee Has Not Established Any Damage

The appellee's claim is predicated on a contention that it is entitled to recover the difference between what

it paid for the raisins furnished to the Government and what it would have paid had there been no Government "interference." With this formula appellant has no quarrel. The trouble lies in its application to the instant circumstances. The undisputed and central facts are these:

Price Paid by The Company for Raisins Processed and Delivered to CCC

1. Raisins are a fungible product. The packer supplying an order simply dips into the raisin bin and extracts the quantity of raisins needed. He cannot identify the raisins withdrawn as to the price paid. If he has been paying various prices for raisins, or if the raisins have been bought on open price contracts, which have not become firm, it is impossible for him to state the price paid for any lot of rasins processed and sold by him.

2. The District Court found (R. 63-64) that The Company did not purchase for the Government account until late December.

3. Raisins were costed from December through May and their delivery to the Government may have occurred before the cost was fixed (Defendant's Exhibit AC). Thus, any raisins costed December or later may have been applied to the Government contracts.

The burden of proof of establishing damages falls upon the appellee, and since appellee admittedly cannot establish the identity of the raisins furnished the Government, it must necessarily be assumed that the raisins which cost the least were supplied. Damages cannot be levied in excess of the maximum provable. *Jones'* Appeal, 62 Pa. 324; *United States* v. *Northern Pacific Ry. Co.,* 116 F. Supp. 277 (Minn.).

In the *Jones* case, supra, the court said:

> Thus if plaintiff prove the delivery of goods, but gives no evidence of their value, it will be presumed that the articles were the lowest price of goods of that description.

The minimum cost paid for 14,000 tons of raisins which could have been supplied to CCC was $116.16 per ton. Since these raisins may have been the raisins supplied the Government, this figure should be used (Defendant's Exhibit AO).

The court's figure of $120.52 per ton is based upon data showing the average cost of 14,000 tons of raisins *costed prior to March 30, 1948,* the final delivery date (Defendant's Exhibit AO). However, *the fact that certain raisins were costed after March 30, does not mean that such raisins were not delivered to the Government.* The costing, as the record discloses, on open price contracts, may and often does take place a considerable time after delivery (R. 109, Plaintiff's Exhibit 52). Hence, the formula of minimum cost should have been used by the trial court.

As to Cost in Absence of Government Interference

The previous problem of determining the cost of raisins furnished by The Company is difficult of solution, but as indicated, a rational conclusion can be reached. The cost to The Company had there been no modification of the Government price support program, does not permit of any solution, short of wild conjecture. The court accepted appellee's figure of $110 per ton, and in its opinion, (R. 64) leaves an inference that

this figure was agreed to by the Government.[47] Nothing could be more wide of the mark. Government counsel consistently and vigorously argued that there was no basis for The Company's assumption that the price, absent Government modification, would have settled at $110 per ton or less (R. 662, 666, 667). The truth is that the evidence does not establish this necessary element of proof, nor can the cost be determined by reasonable inferences.

Grady testified that in view of the Government program, he thought the price would drop to $110 per ton (R. 218). However, despite his expectation, he admitted that he was unable to buy at that figure (R. 205, 206, 233, 341). Furthermore, appellant believes that the Court should not hand down a money judgment against the Government based upon the speculation of a witness, which runs counter to other known facts. For example:

(1) Plaintiff's initial contract (for 10,000 tons) was executed September 25. The Government did not announce its modification until almost three weeks later. In that period, The Company made little, if any, effort to purchase raisins although the delivery period under the contract was October 1, 1947-December 15, 1947, and although it was the customary practice of The Company to buy heavily around October 1 (Plaintiff's Exhibit 10; Defendant's Exhibit N, pp. 15-17; R. 202-342).

(2) The market price of raisins as reported in the

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[47] The Court has found (R. 75, Finding 23) that The Company's bid reflected a grower price of $110. This is misleading. The Court would have been more accurate had it stated that The Company's bid made it essential for The Company to buy at $110 to break even. But the active market price at that time was at least $125 (App. C, Defendant's Exhibit N, p. 15, R. 502).

Market News, (Defendant's Exhibits K, S) was as follows:

(week ending)	Thompson[48]	Muscat	Sultana	Zante
October 8	$115	$110	$100–105	$140
15	115	110	100	140
22	...	...	...	...
29	130	120	110	140–150
November 5	130	120–125	110	150
6 (only)	140	130	120	140–150
12	135	135	120	150
19	130	125	110–115	150
26	130	125	110–115	150
December 3	130	130	110–115	150
10	135	120–125	110–115	150
17	130	110–120	100–110	...
24	130	...	...	...
January 7	120–125	110	100	...
14	115	100–115	90–100	...
21	110	100	90	...
28	100–105	100	85–90	...
February 4	110–115	100–105	85–90	...

(3) To break even, The Company had to buy raisins at an average price of $110 per ton. The market price never reached $110, except for a very few sales in early and mid-October, *and even at prices ranging up to $125 there were practically no sales* (App. B, Defendant's Exhibit K; R. 233). The Company's total firm purchases in the period September 1-November 3 were less than 800 tons at prices ranging from $111.22 to $142.02 (App. B, Plaintiff's Exhibit 46). This indicated grower resistance to packer offerings. Indeed, on October 9, The Company issued an order to its buyer to purchase 1,000 tons at $110 per ton. But the buyer was only able to purchase 135 tons at an average price of $111.22 in the following week, and 32 tons at $114.92 in the second succeeding week (Defendant's Exhibit N, p. 15; Plaintiff's Exhibit 46).

(4) The growers were demanding 90% of parity and the packers knew it (R. 204, 354, 541, 573).

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[48] This is the type raisin covered by Docket OC-95a.

(5) On October 14 and 17 the Government announced purchases of an additional 60,000 tons. The market did not respond. Prices did not commence to rise until October 30 (App. C), and this was apparently due more to the necessity of the packers to fulfill their commercial orders than because of the Government removal of the balance of surplus.[49]

(6) On November 26, the Government made $135 a mandatory price for raisins sold to the Government after that date. This only affected sales of approximately 40,000 tons and again, as the Court will observe from the table, the announcement had little noticeable impact on the market price (App. C; R. 460).[50]

From these facts, how can it be concluded that the

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[49] The Court found that the amended program pushed the price to $135 per ton (R. 78, Finding 34). This finding is not supported by the record. The amended program had no appreciable effect on the market for two or three weeks. Then the seasonal demands more than likely forced the buyers into the market (Defendant's Exhibit K, Bulletin 401, 402), and higher price offers activated the market. Thus, raisins were selling at $115 in the week ending October 8, at $115 in the week ending October 15 (change in program announced on October 14), price trading was at a standstill in the week ending October 22, there were a few sales at $130 in the following week, in the week ending November 5 sales were light at mostly $130 per ton; on November 6 some packers offered $140 per ton, and sales were heavy, but many packers quickly withdrew the $140 price, and most sales in the week ending November 12 were at $135. That influence of the seasonal demands, rather than Government interference, caused price rises is suggested by the fact that raisins not supported by Government purchases rose in price at the same time, and at about the same rate (R. 202; see the table above.)

[50] By November 26, The Company had had two months within which to purchase raisins, delivery of which was scheduled for the period October 1-January 20. By November 26, delivery on the first contract should have been near completion and delivery on the second contract well under way. Hence, how could CCC be responsible for acts which should have followed The Company's performance?

purchase of 60,000 tons prevented the drop in price to $110? This theory, accepted by the District Court, gives no consideration to grower resistance. It assumes without any proof whatsoever that had the Government not acted, the emphatic and sustained resistance of the growers (R. 54, 57, 202, 204, 205, 341, 390, 574, 575) to excessively low prices would have collapsed. If the packers had had no commitments to cover, this argument might have some validity, but the packers had commercial contracts which required delivery of large quantities of raisins and they had to supply raisins in large quantities for the Christmas market. In fact, as the record shows, The Company, by December 1, 1947, had supplied 75% of its commercial commitments (Plaintiff's Exhibit 47, 48). Faced with this pressure, it seems reasonable to conclude that the packers would have had to come to terms with the growers, and that the price would not have been $110 per ton. That price was not reached until January when the commercial demands had been materially met and the Government had suspended purchases (R. 388).

We think that to award damages to appellee, whose predecessor had sold *short—at a price below market*,[51]

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[51] The District Court's statement (R. 57) that The Company bid "on the basis of the then existing market level" is not borne out by the record. The Government's Announcement was made on September 10, 1947. The Company's offer was submitted on September 17, 1947 (Plaintiff's Exhibit 10). The "then existing market level," (if, indeed, there was any) is reported in the Market News Service (Defendant's Exhibit K, Bulletin 396) covering the week ending September 17, as follows:

> With most packers not yet offering to buy, quotations to growers September 17 for natural Thompson Seedless were mostly $125.00 per ton delivered at packers receiving station with an occasional offer slightly lower and a little buying at $130.00 delivered, for delivery by September 20.

The Company bid on the basis of $110 per ton, or $15 per ton below quoted prices. The second offer was submitted by The Company

and to base its damage on the anticipated collapse of the market is to simply ignore the evidence, which establishes that The Company was deliberately taking a gamble as to future market conditions, including further Government price support.

Certainly there is no proof from which a rational conclusion can be drawn that without the change in program the growers would have sold for $110 per ton or less; and if this is to be the basis of damage, the ordinary rules relating to the burden of proof will have to be sidestepped. As aware as we are of our duty to assist the Court to determine the amount of damage, we are not able to even guess the price which might have prevailed had there been no further Government price support. Appellant submits that appellee has not sustained the burden of proving its damage.

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on October 8 (Plaintiff's Exhibit 15), also in the assumption that raisins would be purchased for $110 per ton. The Market News Service (Bulletin 399) covering the week ending October 8, 1947 reflects the price of Thompson Seedless as follows: "Mostly $115, few $110." The report also notes "Considerable grower resistance to current bid was reported * * *." (See Defendants Exhibit L).

The District Court also found that because of CCC's modifications the price of raisins was boosted to "artificially and abnormally high levels" (R. 79), and in its opinion the Court states that the growers were demanding "exorbitant prices." (R. 54). These conclusions are not supportable. The growers wanted parity, which would have meant $150-$160 per ton (R. 204, 541, 573), but they were accepting $130-$135 per ton during the peak of the buying season, prices well below the 90% of parity other farmers were enjoying (Defendant's Exhibits K, S). A quick glance at Plaintiff's Exhibit 46 will disclose the facts with respect to the "exorbitant" prices being paid by The Company. Only in one week of the season did The Company pay more than $140 per ton. Of course, the prices demanded by the growers were more than The Company could afford to pay insofar as their Government contracts were concerned; but these contracts were bid at prices below market, and at approximately one-third of the 1946 price level. These "exorbitant prices" being demanded by the growers were the lowest they had received since 1942 (Plaintiff's Exhibit 44, p. 56).

CONCLUSION

This case does not involve merely the right of a contractor to recover damages from the Government. The fundamental issue is whether a Government agency, engaged in the performance of a Governmental function, has the right to modify its program without responding in damages. In this respect appellant submits that agencies engaged in fixing tariffs, in supporting farm prices, in formulating price controls and in other Governmental functions should be completely free to make and revise their programs as the necessities of the nation require, and that this freedom to act for the public welfare should not be fettered by fear or threat of incurring liability for damages.

Appellant further submits that even had the acts complained of been proprietary in character, there is no basis for recovery since the elements of contract, whether express or implied, are not present. There was no promise by CCC to rigid adherence to the program as first announced, and therefore no basis, in fact, for inferring a promise to compensate The Company for damages sustained by the change in program.

WHEREFORE, appellant respectfully submits that the judgment of the District Court should be reversed, and judgment entered for appellant, with costs.

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APPENDIX A

List of Exhibits Offered
Plaintiff's Exhibits

1. Bill of sale, Roberg to Rosenberg Bros.
2. Letter from Senator Downey to Grady dated September 30, 1948.
3. Marketing Outlook—1947 Crop Raisins.
4. Press release of September 5, 1947.
5. Docket 1947 Dried Fruit Price Support Program.
6. Telegram from Grady to Smith dated September 9, 1947.
7. Letter from Grady to Smith dated September 10, 1947.
8. Telegram from Smith to Grady dated September 12, 1947.
9. Announcement No. 1 of September 10, 1947.
10. Contract A6pm(Ff)—1647 dated September 24, 1947.
11. Telegram from Walker to Rosenberg Bros. dated September 23, 1947.
12. Telegram from Rosenberg Bros. to Walker dated September 24, 1947.
13. Press release of September 25, 1947.
14. Announcement No. 2 of October 1, 1947.
15. Contract A6pm (Ff)-1893 dated October 13, 1947.
16. Telegram from Walker to Rosenberg Bros. dated October 13, 1947.
17. Telegram from Rosenberg Bros. to Anderson dated October 14, 1947.
18. Telegram from Rosenberg Bros. to Anderson dated October 15, 1947.
19. Press release of October 14, 1947.
20. Letter from Rosenberg Bros. to Department of Agriculture dated October 21, 1947.

21. Telegram from Grady to Anderson dated October 31, 1947.

22. Letter from Grady to Downey dated November 3, 1947.

23. Telegram from Anderson to Grady dated November 6, 1947.

24. Press release of November 26, 1947.

25. Press release of October 17, 1947.

26. Telegram from Davidson to Grady dated December 2, 1947.

27. Grady's memorandum re telephone conversation with Anderson on December 4, 1947.

28. Telegram from Grady to Davidson dated December 4, 1947.

29. Telegram from Davidson to Grady dated January 21, 1948.

30. Letter from Laflin to Walker dated January 22, 1948.

31. Letter from Grady to Downey dated January 23, 1948.

32. Telegram from Allmendinger to Rosenberg Bros. dated January 26, 1948.

33. Telegram from Grady to Allmendinger dated January 28, 1948.

34. Telegram from Grady to Allmendinger dated January 28, 1948.

35. Telegram from Grady to Allmendinger dated January 28, 1948.

36. Telegram from Grady to Allmendinger dated January 29, 1948.

37. Telegram from Downey to Grady dated January 30, 1948.

38. Claim of Rosenberg Bros. dated February 26, 1948.

39. Letter from Grady to Anderson dated September 21, 1948.

40. Letter from Anderson to Grady dated February 2, 1949.

41. Letter from Grady to Anderson dated February 3, 1949.

42. Record of shipments, Contract No. A6pm(Ff)-1647.

43. Record of shipments, Contract No. A6pm(Ff)-1893.

44. Market News issued in July 1948.

45. Schedule showing cost of raisins acquired to cover CCC contracts.

46. Schedule showing record of 1947 crop raisins acquired by Rosenberg Bros.

47. Schedule showing civilian sales by Rosenberg Bros.

48. Schedule showing purchases and sales by Rosenberg Bros.

49. Minutes of the Board of CCC dated October 27, 1947.

50. Report of Smith dated October 23, 1947.

51. Tabulation of bids on first invitation.

52. Grower contract forms.

53. Tabulation of Rosenberg export sales.

54. Tabulation of accepted bids.

55.. Plaintiff's LIFO computations.

56. Plaintiff's LIFO computations.

57. Plaintiff's computation of damage.

58. Plaintiff's computation of damage.

DEFENDANT'S EXHIBITS

A. Letter from Stern to Grady dated January 26, 1951.

B. Memorandum from Grady to Oppenheimer dated September 30, 1947.

C. Rosenberg "tags".

D. Letter from Grady to Cummings dated September 4, 1948.

E. Press release of August 4, 1947.

F. Memorandum re telephone conversation between Anderson and Grady on December 4, 1947.

G. Stenographer's notes.

H. Letter from Anderson to Weinfeld dated September 8, 1949.

I. Letter from Smith to Grady dated October 13, 1949.

J. Bulletin of Dried Fruit Association dated October 8, 1947.

K. Federal State Market News Service bulletins from September 11, 1947 to October 30, 1947.

L. Telegram from Walker to Graham dated October 9, 1947.

M. Minutes of Board meeting of CCC on October 8, 1947.

N. Deposition of Edmund A. Foley.

O. Memorandum from Oppenheimer to Ashby dated May 28, 1948.

P. Fresno Bee newspaper article dated October 10, 1947. (Id.)

Q. Fresno Bee newspaper article dated October 12, 1947. (Id.)

R. Announcement No. 10 dated December 5, 1947.

S. Federal State Market News Service bulletins from November 6, 1947 to June 3, 1948.

T. Federal State Market News Service bulletins from August 7, 1946 to September 4, 1946. (Id.)

U. Transcript of notes of Allmendinger re Grady conversation.

V. Notice to Deliver.

W. Letters in lieu of notice to deliver.

Y. Payment voucher form.

Z. Announcement FV-B-6 dated November 7, 1947.

AA. Contract A6pm(Ff)-1940 dated November 26, 1947.

AB. Schedule of shipments under contract A6pm (Ff)-1940.

AC. Tabulation of purchases and sales by Rosenberg Bros.

AD. Statement of profit and loss re Rosenberg Bros. (Id.)

AE. Purchase and sales agreement.

AF. Letter from Wright to Heller, et al., dated December 23, 1947. (Id.)

AG. Tabulation of purchases and sales of Rosenberg Bros. (Id.)

AH. Letter from Grady to Cooper dated October 8, 1947.

AI. Record of purchases and sales of Rosenberg Bros. (Id.)

AJ. Charter of Commodity Credit Corporation.

AK. By-Laws of Commodity Credit Corporation.

AL. Contract Disputes Board hearing. (Id.)

AM. Contract Disputes Board minutes. (Id.)

AN. Letter from Sullivan to Ehrlich dated August 31, 1950. (Id.)

AO. Schedule re plaintiff damages.

APPENDIX B

RB&CO'S PURCHASES ON CLOSED CONTRACTS
(Plaintiff's Exhibit 46)

Period Ending	Amount (Tons)	Period Ending	Amount (Tons)
6/27/47	1,785	2/16/48	54
7/15/47	466	2/24/48	888
7/26/47	956	3/ 1/48	678
9/ 6/47	10	3/ 8/48	353
9/22/47	1–	3/15/48	2
10/ 2/47	10	3/22/48	387
10/ 6/47	1–	3/30/48	267
10/14/47	135	4/ 5/48	76
10/20/47	32	4/13/48	1,996
10/27/47	3	4/20/48	20
11/ 3/47	508	4/27/48	128
11/10/47	4,785	5/ 3/48	552
11/17/47	4,932	5/10/48	1,070
11/24/47	1,111	5/17/48	87
12/ 1/47	4,035	5/31/48	1,048
12/ 8/47	842		
12/15/47	1,870		
12/22/47	2,046		
12/30/47	615		
1/ 5/48	340		
1/12/48	1,090		
1/19/48	438		
1/26/48	845		
2/ 2/48	191		
2/ 9/48	639		

APPENDIX C

MARKET PRICE OF NATURAL RAISINS
(Defendant's Exhibits K, S)

Period Ending	Price	Period Ending	Price
9/11/47	$125–140	2/25/48	$110–120
9/17/47	$125–130	3/ 3/48	$110–125
9/24/47	(not stated)	3/10/48	$110–125
10/ 1/47	$115–120 (mostly $120)	3/17/48	$110–120
10/ 8/47	$110–115 (mostly $115)	3/24/48	$110–115
10/15/47	$110–115 (mostly $115)	3/31/48	$110–115
10/22/47	(not stated—"Price trading at a standstill")	4/ 7/48	$110–117.50
10/29/47	$130–135 (mostly $130)	4/14/48	$110–115
11/ 5/47	$130–135	4/21/48	$110–115
11/ 6/47	$140	4/28/48	$110–115
11/12/47	$135–140 (mostly $135)	5/ 5/48	$110–115
11/19/47	$125–130 (mostly $130)	5/12/48	$115–120
11/26/47	$125–135 (mostly $130)	5/19/48	$115–120
12/ 3/47	$130–135 (mostly $130)	5/26/48	$115–120
12/10/47	$130–135 (mostly $135)	6/ 2/48	$120–135
12/17/47	$130–135 (mostly $130)		
12/24/47	$130		
1/ 7/48	$120–125		
1/14/48	$110–115 (mostly $115)		
1/21/48	$105–110 (mostly $110)		
1/28/48	$100–110 (mostly $100–105)		
2/ 4/48	$110–115		
2/11/48	$110–115		
2/18/48	$110–115		

APPENDIX D

When the Commodity Credit Corporation entered into the contracts in question, it was operating under its Delaware charter as an agency and instrumentality of the United States.

The Commodity Credit Corporation was created on October 17, 1933, under the laws of the State of Delaware as an agency of the United States pursuant to Executive Order 6340, dated October 16, 1933, issued by virtue of the authority vested in the President by section 2(a) of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195).[1] Section 2(c) of that Act provided that any agencies established under Title I of the Act should cease to exist at the expiration of two years after the date of enactment of the Act. Congress expressly recognized the Corporation as being an agency of the United States, and by the Act of January 31, 1935, directed that the Corporation should "continue until April 1, 1937, or such earlier date as may be fixed by the President by Executive order, to be an agency of the United States." The Corporation was continued as an agency of the United States until June 30, 1948, by successive amendments to the Act of January 31, 1935 (15 U. S. C. 713).[2] By section 401 of the

[1] Under this subsection, the President was authorized "to establish such agencies" as necessary to effect the policy of Title I of the Act, *viz.*, to remove obstructions to the free flow of interstate and foreign commerce; to provide for the general welfare by promoting full utilization of the productive capacity of industries; and to increase the consumption of agricultural products by increasing the purchasing power, etc.

[2] Act of January 26, 1937, 50 Stat. 5; Act of March 4, 1939, 53 Stat. 510; Act of July 1, 1941, 55 Stat. 498; Act of July 16, 1943, 57 Stat. 566; Act of December 23, 1943, 57 Stat. 643; Act of February 28, 1944, 58 Stat. 105; Act of April 12, 1945, 59 Stat. 551; and Act of June 30, 1947, 61 Stat. 201.

President's Reorganization Plan No. 1 (t U. S. C. 133t, note), effective July 1, 1939, the Corporation was made a part of the United States Department of Agriculture, and its operations were placed under the supervision and control of the Secretary of Agriculture. By Executive Order No. 9322 (8 F. R. 3807), dated March 26, 1943, as amended by Executive Order No. 9334 (8 F. R. 5423), dated April 19, 1943, the Commodity Credit Corporation and certain other activities of the Department of Agriculture were consolidated within that Department into a War Food Administration under the direction and supervision of an Administrator, appointed by and directly responsible to the President. However, by Executive Order No. 9577 (10 F. R. 8087), dated June 29, 1945, the War Food Administration terminated at the close of business on June 30, 1945, and the functions and duties of the War Food Administrator were transferred to the Secretary of Agriculture.

The Commodity Credit Corporation was originally capitalized at $3,000,000, its stock being subscribed by the Secretary of Agriculture and the Governor of the Farm Credit Administration. The funds for such subscription were derived from the appropriation authorized by section 220 of the National Industrial Recovery Act (48 Stat. 210) and made available by the Fourth Deficiency Act for the Fiscal Year 1933 (48 Stat. 274). As authorized by the Act of April 10, 1936, the Corporation's capitalization was increased to $100,000,000 and the additional $97,000,000 of the Corporation's stock was acquired by the Reconstruction Finance Corporation. [3]

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[3] Act of April 10, 1936, 49 Stat. 1191, 15 U.S.C. 713a.

By Section 3 of the Act of March 8, 1938, the Secretary of Agriculture, the Governor of the Farm Credit Administration, and the Reconstruction Finance Corporation were directed to transfer the ownership of the stock of the Corporation to the United States.[4] That Act also provided that all rights of the United States arising out of the ownership of such stock should be exercised by the President of the United States or by such officers or agencies as he may designate. Executive Order No. 8219, issued August 7, 1938, transferred to the Secretary of Agriculture the authority to exercise, on behalf of the United States, all rights arising out of the ownership of the stock of the Commodity Credit Corporation.[5]

The Congress, by section 4 of the Act of March 8, 1938, authorized the Corporation, with the approval of the Secretary of the Treasury, to issue and have outstanding bonds, notes, debentures, and similar obligations in an aggregate amount not to exceed $500,000,000 fully guaranteed as to principal and interest by the United States Government.[6] By successive amendments to the Act of March 8, 1938, the borrowing power of the Corporation was increased, the last amendment being the Act of April 12, 1945, which increased the Corporation's borrowing power to $4,750,000,000.[7]

The Act of March 8, 1938 (52 Stat. 107), as amended by the Act of April 12, 1945 (59 Stat. 50), required the Secretary of the Treasury to make an appraisal of the net worth of the Corporation as of June 30 in each

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[4] Act of March 8, 1938, 52 Stat. 107, 15 U.S.C. 713a-3.

[5] 4 F.R. 3565.

[6] Act of March 8, 1938, 52 Stat. 108, 15 U.S.C. 713a-4.

[7] Act of April 12, 1945, 59 Stat. 50, 15 U.S.C. 713a-4.

year, provided for the restoration of any capital impairment disclosed in the appraisal from appropriations authorized for such purpose, and directed the Corporation to pay into the United States Treasury any net worth in excess of $100,000,000.

The Delaware Charter of the Commodity Credit Corporation authorized the Corporation, among other things, to engage in buying, selling, lending, and other activities with respect to agricultural commodities, products thereof, and related facilites. [8]

These charter powers enabled the Corporation to engage in extensive operations for the purpose of increasing production, stabilizing prices, assuring adequate supplies, and facilitating the efficient distribution of agriculture commodities, foods, feeds, and fibers.

Section 304(b) of the Government Corporation Control Act (59 Stat. 597, 31 U.S.C. 847-849) required that all wholly-owned government corporations incorporated under State law be reincorporated by act of Congress in order to continue as agencies or instrumentalities of the United States. [9] By the Commodity Credit Corporation Charter Act of June 29, 1948, the Congress created a federal corporation and all assets, funds, and property, together with enforceable claims of the Delaware corporation, were transferred to the Federal corporation. [10] Section 6 of said Act provided that the "Commodity Credit Corporation, a Delaware corpora-

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[8] Delaware Charter is set forth at p. A307, Sen. Doc. No. 86, 79th Cong., 1st Sess.

[9] Act of December 6, 1945, 59 Stat. 602, 31 U.S.C. 869.

[10] Act of June 29, 1948, 62 Stat. 1070, 15 U.S.C. 714.

tion shall cease to be an agency of the United States." Section 2 of the Act provided that the Federal corporation "shall be an agency and instrumentality of the United States." [11]

[11] The treatment of the Federal Surplus Commodities Corporation by the Congress and the courts as an agency of the United States is analogous to that afforded the Commodity Credit Corporation. The Federal Surplus Commodities Corporation was chartered by officials of the Federal Government under the laws of the State of Delaware in the absence of an Executive order but pursuant to authority conferred in section 2(a) of the National Industrial Recovery Act (48 Stat. 195). It was recognized by Congress as an agency of the United States (Act of June 28, 1937, 50 Stat. 323, 15 U.S.C. 713c) and the courts have recognized its contracts and actions as being those of the United States: John Morrell & Co. v. United States, 89 Ct. Cls. 167; United States v. Samuel Dunkel & Co. 184 F. 2d 894 (C.A. 2, 1950); Priebe & Sons, Inc. v. United States, 332 U.S. 407, and Traders Compress Co. v. United States (Ct. Cls.), 74 F. Supp. 649.

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